No. 3042.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HELEN K. KINNEY,
Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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INDEX

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STATEMENT OF THE FACTS AND CONTENTIONS.

Notwithstanding the camouflage, sophistry and inaccuracies with which the plaintiff's brief abounds, the case is really very simple.

The principal questions on the merits are:

(1) Would the devise "unto Kahakuakoi and Kealohapauole and to the heirs of the body of either," taken by itself and in connection with the other parts of the will and codicils, create a life estate in the first takers and a remainder in fee simple in the heirs of their bodies, as contended by the plaintiff, or a fee tail in the first takers, as contended by the defendant, if a fee tail could exist in Hawaii; and

(2) If it would create a fee tail, in case a fee tail could exist in Hawaii, then, since, as held in *Rooke* v. *Queen's Hospital,* 12 Haw. 375, a fee tail (and also a fee simple conditional) cannot exist in Hawaii, should the estate be held to be a life estate and remainder, as contended by the plaintiff, or a fee simple, as contended by the defendant?

Both the Circuit Court and the Supreme Court of Hawaii held that the estate would be a fee tail, if a fee tail could exist in Hawaii, and that, since a fee tail (and also a fee simple conditional) cannot exist in Hawaii, it would be a fee simple. These holdings, we submit, are absolutely impregnable.

Besides the foregoing two questions we present two others. We contend:

(3) In part I of our argument, that the decision of the Supreme Court of Hawaii is of such a local nature that it should be affirmed on the authority of *Boeynaems* v. *Ah Leong,* 242 U. S. 612, without going into the merits; and

(4) In part VI of our argument, that, even if the estate should be held to be a life estate and remainder, the plaintiff could not recover at this time, because the defendant would still have the right of possession under a lease.

A decision of (3) for the defendant would render unnecessary a decision of (1), (2) and (4). A decision of (1) and (2) for the defendant would render unnecessary a decision of (3) and (4).

On the main questions, (1) and (2), on the merits, we contend, in part II of our argument, that the use

of the aptest technical words, all applicable presumptions, the frame of the sentence and the will and codicils taken as a whole, combine to make the strongest possible case for an estate tail; in part III, that the word "either" and the devise over "upon default of issue," which are relied on by the plaintiff in support of her theory of a life estate and remainder, not only do not support that theory but actually add support to our theory of an estate tail; in part IV, that on principle and by unanimity of authorities elsewhere both in cases precisely in point and in analogous cases, as well as by Hawaiian case and statute law (subject to one qualification immaterial to this case), an estate which would be an estate tail in any particular jurisdiction, if an estate tail could exist there would be a fee simple, if an estate tail (and a fee simple conditional) could not exist there; and in part V that the Hawaiian cases of *Nahaolelua* v. *Heen,* 20 Haw. 372, and *Boeynaems* v. *Ah Leong,* 21 Haw. 699, which plaintiff's counsel attempts to distort, and upon which as so distorted he relies to show that in Hawaii an estate which would be an estate tail, if such an estate could exist there, would in all cases be a life estate and remainder, since an estate tail cannot exist there, not only do not show that, but on the contrary, support our contention that in this case the estate should be held to be a fee simple in the first takers.

We regret that we cannot pass at once to the argument, but so full of the "camouflage, sophistry and inaccuracies" above referred to is the plaintiff's brief that we feel compelled, in fairness to the court as well

as to ourselves and the lower courts, to refer to a few of the more illustrative and flagrant instances.

Before taking up some of the more serious matters permit us to correct the quotation of the 5th item of the will as set forth on page 2 of opposing counsel's brief. In the clause "I also devise unto them and to the heirs of the body of either," he has interpolated a comma between "them" and "and"; and in next to the last line he has omitted "the same" after "issue." These errors doubtless are due to inadvertence, although attention was called to them in the lower courts, where the same mistakes were made.

Again, in his restatement of the devise in his own way on page 75 of his brief he introduces language from the preceding bequest as if it were a part of the devise in question, saying "The objects of the testratrix's bounty are made clear by the language of the devise, which is 'unto them,' that is to say, *'unto'* Kahakuakoi and Kealohapauole 'and *to the* survivor of them * * * so long as *either* of them may live' *'and to* the heirs of the body of *either' 'upon* default of issue, the same *to* go to my trustees'." The words "and to the survivor of them * * * so long as either of them may live" belong to the preceding bequest and are not found in the devise in question. Incidentally in this connection it may be added that, as held by the Supreme Court (Tr., pp. 50-51), the fact that the preceding bequest was only for life, not only does not indicate that the devise in question also was only for life, but on the contrary indicates, be-

cause of the difference in phraseology, that the devise was not intended to be merely for life.

Throughout his brief, opposing counsel misstates both our contentions and the decisions of the lower courts. On pages 7 and 8 of his brief he purports to state our contentions as made by us and on pages 9 and 10 he purports to restate them as he would conceive them to be in effect. We utterly repudiate these. For instance, on page 7 he says that we contend "(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise two estates" and, at page 9, that we contend that "1. Ka. and Ke. took a life estate by the entirety," and, on the same page, that we contend that "4. Estates tail by way of cross remainder would be created in the respective heirs of the body of Ka. and Ke. on failure of the heirs of the body of either." He continues (page 10): "The claim of the defendant was not sustained by the Circuit Court which apparently decided the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, an obvious error, but was sustained by the Supreme Court of Hawaii," and (page 11) "It will be seen that under the claims of both parties and under the decision of the Supreme Court of Hawaii, the immediate estate is a life estate by the entirety in the first takers." Similar statements in substance are made elsewhere in the brief—apparently for the purpose of making the lower courts and ourselves appear to take in large part opposing counsel's view in regard to a life estate in the first takers. Somewhat similarly and for the same purpose he re-

iterates that the lower courts found that the testatrix did not intend to create a fee simple. See, for instances, pages 21 and 87 of his brief.

Now, the fact is that, throughout, both the lower courts and we have taken the position that the first takers did not take two estates, that they took only one estate (a fee tail, if a fee tail could exist, otherwise a fee simple) that they did not take a mere life estate, and especially that the heirs of their bodies would not in any event take remainders, whether cross or direct, but would take, if at all, only by descent. Moreover, the Circuit Court did not decide the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, but on that point held merely that since the estate became a fee simple because it could not exist as an estate tail, it could be conveyed by deed, as was done in this case. Further, although both the lower courts found (as we also contended) that the testatrix did not intend to create a fee simple, they found equally (as we also contended) that she did not intend to create a life estate and remainder, because she intended to create a fee tail. But what they and we emphasized was, not that she did not intend to create a fee simple, but that she did intend to create an estate of inheritance (a fee tail) and did not intend to create a life estate and remainder.

Opposing counsel relied principally on the use of the word "either" to show that the first takers took only a life estate and that the heirs of their respective bodies would take cross remainders.

We contended that the obvious effect of the word "either" was to show that the first takers took a fee tail general (the heirs of the body of each, whether by the other or by some other spouse), and not a fee tail special, as would be the case if the heirs of the body were confined to those of the joint bodies. In this, the Supreme Court agreed with us (Tr., p. 49). The Circuit Court did not find it necessary to express an opinion upon it.

We contended further that if "either" had any other effect, it would be merely to make the inheritances of the first takers several instead of joint, just as might be the case if "each" or "respectively" had been used instead of "either." If "either" did not have this effect, the first takers would have a fee tail (if a fee tail could exist, otherwise a fee simple) by the entirety throughout. If "either" did have this effect, it would affect in that respect only the inheritances, so that the fee tail (or fee simple) would remain joint (that is, by the entirety) for the period of the joint lives and be several thereafter. We took the position that it was immaterial whether "either" had this effect or not, because in either case the estate would be a fee tail (or fee simple) in the first takers, and the only difference would be that in the one case the fee (whether tail or simple) would be held jointly all of the time and in the other case would be held jointly during life and severally thereafter. If the first takers had not been husband and wife, they would have held severally (in common) all the time.

Opposing counsel cunningly endeavors to confuse

estates in respect of duration with the mere manner of holding them. A fee tail or fee simple may be held part of the time jointly and the rest of the time severally without being a life estate and remainder in the usual sense, and, of course, without there being anything in the nature of cross remainders. If, for convenience, the estate in such case may be spoken of as a life estate and remainder, as is sometimes done, it must be remembered that the remainders not only are not cross remainders but that they are in the same persons that have the life estate and not in the heirs or heirs of the body at all.

There were only three possibilities. In any case the estate would be a fee (whether tail or simple) in the first takers, but that fee might be held (1) jointly all the time or (2) severally (in common) all the time or (3) jointly part of the time and severally the rest of the time. There could be no fourth possibility in a case like this, namely, a life estate in the first takers and a remainder in fee in the heirs. All agree that in this case the first takers would hold jointly (by the entirety) at least during their lives. The only question is whether they would hold jointly or severally the rest of the time, and that is entirely immaterial for the purposes of this case. We are inclined to think that they would hold jointly throughout. The Circuit Court seemed to assume this without saying so. The Supreme Court thought that if "either" had any other effect than to make the estate a fee tail general instead of special, it would be the effect referred to of making the inheritances several but that it was immaterial

for the purposes of this case whether it would have that effect or not.

If the fee was to be held jointly (by the entirety) throughout, the result would be that on the death of one of the first takers, the survivor alone would have the fee and upon the death of the survivor it would descend to the survivor's heirs alone, if it had not been disposed of. If, on the other hand, the fee was to be held jointly for life and severally thereafter, the result would be that on the death of one of the first takers, the survivor alone would hold until his death and then his half would pass to his heirs and the other half would pass to the other's heirs; the estate of the other's heirs would be in abeyance after the other's death until the death of the survivor; another way of describing the estate is to say that the first takers took a fee as tenants in common subject to holding jointly during their lives. If, in the third place, the fee was to be held in common throughout, upon the death of each of the first takers, his or her half would descend to his or her heirs, and the heirs of the body of the one first dying would not have to wait until the death of the other.

Upon the foregoing we invite special attention to this language of the Circuit Court (Tr., pp. 34, 36):

> "I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail. In that she was thwarted by the law of Hawaii, which has declared that no

such estate exists in Hawaii. The nearest we can approach, therefore, the intention of the testatrix (having decided that she did not intend to create a life estate in Kahakuakoi and Kealohapauole) is to declare the estate which she did create a fee simple.

"I am not, by so declaring, intending to hold that the testatrix intended to create in Kahakuakoi and Kealohapauole a fee simple estate. It is plain that the testatrix knew well how to create such an estate. I am holding merely that the words she used must be interpreted to create such an estate; that her apparent intention is not enforceable under the law of Hawaii; that the nearest we may arrive at that intention is to declare that the devise did create a fee simple.

* * * * * * * *

"If, therefore, a fee simple was created, the mortgage, the sale thereunder, the purchase by Charles R. Bishop, and the mesne conveyances through the defendant, are all legal, and the decision and judgment must be for the defendant."

And the following passages from the decision of the Supreme Court, which, after stating the contentions of counsel and discussing the language of the will and codicils, said:

"We must hold, therefore, that the intention of the testatrix was to create in the devisees an estate of inheritance—an estate in fee tail—unless we find words in the will which clearly show that the testatrix meant something else." (Tr., p. 48.)

The court then referred to the matters relied on by opposing counsel to show a life estate and remainder, and particularly the word "either," and continued:

"But we think the conclusion reached by counsel is not sound. The word 'either' does not refer

> to (in the sense of affect) the first takers or necessarily affect the estate devised to them. It relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. (Citing authorities.) And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words "of either" the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general is sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse." (Tr., p. 49.)

The Supreme Court then, after discussing other matters relied on by opposing counsel, said:

> "We conclude, therefore, that there is no language in the will which shows that the testatrix used the words 'heirs of the body' in any other than their usual and technical sense. On the other hand, there is affirmative evidence tending to show that the testatrix did not mean that Kahakuakoi and Kealohapauole were to have an estate for life only." (Tr., p. 51.)

The court then proceeded to refer to such affirmative evidence. Opposing counsel takes exception (see his brief, pp. 10-11, 25-26) to the statement of the court to the effect that it is only a matter of academic interest how the heirs of one spouse who were not also the heirs of the other would take. He contends that the court should have considered all possibilities. In the first place, the court did consider this very possibility, namely, that "either" might have the effect of making "heirs of the body" include heirs of each as well as heirs of the joint bodies, so far as that was necessary for the construction of the devise. In the second place, while it was unnecessary for the court, after having arrived at the construction of the devise as giving a fee to the first takers, to proceed to say just how imaginary heirs that did not exist and never could exist might take if the first takers had not disposed of their fee, the court did in fact proceed to say how such heirs would take if they existed and had a chance to take. (See quotations above.)

Opposing counsel indeed throughout his brief misstates the decision of the Supreme Court of Hawaii as well as our own argument. For instance, in next to the last paragraph of his brief he states that the Supreme Court "holds that the testatrix should be presumed to have intended an illegal estate rather than a legal estate." What could be farther from the fact? (See Tr., pp. 51-52.)

We commend to the court the decision of the Supreme Court as a more than usually full, clear and

convincing opinion, and, without specifying other instances of misstatement, we respectfully ask the court to look to that decision and to our brief, rather than to opposing counsel's brief, for what the court decided and what we contend.

As to the facts or "surrounding circumstances," counsel for the plaintiff says that the Supreme Court gave no weight to these although the Circuit Court ascribed importance to them—particularly the dependence of the beneficiaries on the testatrix's bounty and their relationship to her. See, for instance, page 27 of his brief. As matter of fact, the Supreme Court did consider these. (Tr., p. 53.) But it evidently was of the opinion that, if these were of such a nature as might throw some light on the question under other circumstances, the will and codicils were drawn with such "care and accuracy of expression" by one of Hawaii's most eminent lawyers (Tr., p. 45) and so clearly left "no doubt as to what the testatrix intended" (Tr., p. 52), they (the surrounding circumstances) could have no effect in this case. The court cannot make a will for the testatrix. And that is precisely the view taken by the Circuit Court also. (Tr., pp. 31-32.) If counsel wished to raise this point, he should not only have made an assignment of error specifically covering it but he should have brought up the evidence in the case. This was peculiarly a matter for the lower courts, which had the evidence before them.

The record, however, so far as it goes, and much more so the evidence not brought up, so far from

favoring a life estate and remainder, favors, we submit, a fee in the first takers. Plaintiff's counsel refers to the matters of dependence and relationship more particularly at pages 1, 4, 65, 74 of his brief. These might account for the fact of the bequest and devise to these people, as similar facts might account for almost any bequest or devise, but they do not throw light on what sort of a devise the testatrix intended to make, unless indeed they favor a fee in the first takers.

Kahakuakoi, one of the first takers, her husband being the other, was only distantly related to the testatrix. No one knew precisely how. She and her husband were servants and retainers of the testatrix and lived on her premises with many other servants and retainers. But they were Hawaiians of the old-fashioned good, faithful sort. Naturally the testatrix wished to make some provision for them. And yet she gave them even less than she gave some of her servants. She gave them a bequest of $30 a month and the land in question, which then yielded $14-7/12 a month ($175 a year), a total of $44-7/12 a month or $22.29 each, less taxes, etc. Some of the servants received more. See, for instance, item 6 of the will. These devisees could make such provision for their children as they pleased.

On the other hand, the heirs of their bodies were an uncertain, fluctuating class. Most of their children had died. There were four then living. Some or all of these might die before their parents, as their rate of mortality was great. One of them, born shortly before

the will was made, died shortly after the testatrix died. Another, the plaintiff's mother, through whom the plaintiff claims, died long before her parents. Other children might be born and might die. Plaintiff's counsel says (brief, p. 65) that such was the case. The testatrix had had somewhat to do with one of the children, Niulii, plaintiff's mother; less to do with another, Lydia; and nothing to do with still others, George and those who died after the will was made. She made no distinction between these. The one with whom she had the most to do, the plaintiff's mother, was a most wayward girl and a great trial to the testatrix, one of whose maids she was for a time until the testatrix could stand her escapades no longer, when she put her in a boarding school, as she did many other girls.

The plaintiff's own theory was that shortly before the plaintiff's birth, the testatrix finding the plaintiff's mother, Niulii, about to give birth to the plaintiff, compelled her to marry one of the many reputed fathers of the child, a common Hawaiian, much older than Niulii (who was only about 15 or 16 years old), a divorced husband, of unknown parentage, reared by a Chinaman, and whose occupation was that of a cook, valet and general house servant. If Niulii had lived and taken a fee simple in remainder she could and doubtless would have disposed of it and the plaintiff would have taken nothing. (See Tr., pp. 19, 24, 26-28, 77-78.)

Not quite all of this appears in the record in this court, but all and more appeared in the evidence, and

enough appears in the record here. If we have gone too far in stating some details not in the record in this court, we at least have come short of stating, as counsel for the plaintiff has done, matters that were not even in the evidence in the court below. All of which demonstrates the absurdity of asking this court to revise the opinions of the lower courts as to the "surrounding circumstances". The record certainly discloses nothing upon which the court could base a conjecture, if a conjecture were permissible, that the testatrix would probably have preferred to give the heirs of the body a fee simple in remainder and the parents only a life estate rather than give the parents a fee tail. The facts, if anything, favor the latter.

Plaintiff's counsel essays also to present facts from which he would have it inferred that the testatrix could not have intended to create an estate tail. He says that the testatrix could not have intended an estate which the court said in the *Rooke* case had never been recognized in Hawaii, and was inconsistent with Hawaiian law, which the testatrix had presumably never heard of and which her attorney, who drew the will and codicils presumably knew could not exist in Hawaii, and that this is shown by the history of this title, and especially as the testatrix was the last of the Kamehamehas and a typical Hawaiian. (His brief, pp. 27, 36-43, 66-72.)

True, the testatrix was a typical Hawaiian—in the sense that she was probably the highest type of Hawaiian in culture and knowledge and wisdom that ever lived, and she undoubtedly had heard of estates

tail. The will itself shows this also. If she had not heard of them under that name, which is highly improbable, that would not preclude the idea of an intention to create one, that is, to give a fee limited to the heirs of the body. Anyone familiar with Hawaiian wills and conveyancing knows how often the Hawaiians attempt to limit alienations and descents. The attorney, Judge Hatch, who drew the will and codicils (which are in his handwriting) then a leader of the Hawaiian bar and afterwards a Justice of the Supreme Court (Tr., p. 45), undoubtedly did not know that estates tail could not exist in Hawaii, but on the contrary evidently believed they could exist there. His drafting of the devise in question is susceptible of no other explanation.

No one at that time knew or apparently even supposed that estates tail could not exist there. That was not known until the decision in the *Rooke* case sixteen years later, and that was one of the most hotly contested and exhaustively considered cases ever tried in Hawaii. It was strenuously urged in that case by able counsel that estates tail could exist in Hawaii. And, outside of many members of the local bar, opinions by John Gray of Boston and Sir Howard Elphinstone of England were obtained. These opinions are referred to in the decision.

It is true that, as the court said in that case, estates tail had not been recognized, that is, judicially or by statute, in Hawaii, but that was not deemed in that case any reason for holding that the testator did not intend an estate tail, any more than the same court of

different personnel later took a similar view in the *Nahaolelua* and *Boeynaems* cases, and both the Circuit and Supreme Courts had no hesitation in holding in the present case that the testatrix intended to create an estate tail. That has been true also in many other jurisdictions to be referred to in part IV of this brief, where again and again wills and deeds have been made on the theory that estates tail were lawful, only to have it decided after full investigation at a later date that such was not the case—in the opinion of the court.

In the present case, the Supreme Court said that an impression seems formerly to have prevailed that fees tail could exist in Hawaii. This statement is supported by the history of the title in question. Kahakuakoi and Kealohapauole evidently thought they had more than a life estate. They leased the land to Mr. Robinson in 1890, six years after the testatrix died, for a term of fifty years, to begin upon the expiration of an existing lease, January 1, 1892. They evidently thought also not only that they were the only devisees but that their estate was a fee tail and that the entail could be barred by deed, because later in the same year, 1890, they mortgaged the land in fee simple to the bank of Bishop & Co., principally owned by the testatrix's husband, Charles R. Bishop, and in that mortgage described the land as "being the same premises devised *to us* by Will of B. Pauahi Bishop", and stated that the land was conveyed "freed and discharged from any *estate tail* of us and all remainders, estates and powers to take effect after the determination or in defeasance of such *estate tail*". Mr. Bishop,

the testatrix's husband, also evidently thought an estate tail could be and was created, and that the entail could be barred by deed, because he accepted this mortgage and loaned $3,000 on its security, which was about all that the land was then worth, and later, in 1893, on foreclosure of the mortgage, he bought the land for $4,700. (Tr., pp. 76, 93.) This mortgage would seem also to confirm the view that Judge Hatch understood that the estate was an estate tail, because as attorney for the bank he presumably drew or passed upon the mortgage.

Counsel for the plaintiff also endeavors to make capital out of the fact that Mr. Robinson paid Mr. Bishop only $6,000 for the land and then obtained only a conveyance without warranty, and before buying obtained a quitclaim deed, the day before, from Kahakuakoi and Kealohapauole and their children, Lydia and George, but afterwards conveyed with warranty to the defendant for $150,000 in stock. (See particularly page 73 of his brief.)

But Mr. Robinson was justified in obtaining the quitclaim deed from the devisees and their children as a matter of business precaution to guard against possible flaws in the foreclosure proceedings or even against the possibility of its being held that the entail could not be barred by mortgage deed or the possibility that it might be held that estates tail could not exist or to guard against claims of this sort being made, however unfounded they might be. This would not show that any one thought that the testatrix did not intend to create an estate tail. It would rather

show the opposite. And the fact that the devisees and their children were ready to give a release of their possible rights for five dollars, shows that they considered that all their interests, whatever they were, had passed under the mortgage and its foreclosure.

What the plaintiff and her relatives thought of their title is shown further by the fact that in 1906, her brother, John Paalua, since deceased, and through whom she claims in part, and again in 1914, he and George gave for $1 an option to the plaintiff and her husband respectively to purchase their interests for $1,000. (Tr., p. 77.) The fact is also that Mr. Robinson paid Mr. Bishop the then full value of the land, $6,000, in 1894.

Plaintiff's counsel insinuates also that Mr. Robinson was willing to give a warranty deed because he thought that the plaintiff, who did not join in the release, was illegitimate, and that the defendant was willing to pay Mr. Robinson so much because of the warranty; also that the $150,000 of stock was worth several times its par value, and that the land was really worth that much and that the plaintiff and her uncle and aunt have been relieved of their land for a song.

The fact is that the plaintiff was then a little girl and her parents were dead and there is nothing in the record here or in the evidence, which is not here, to show that Mr. Robinson ever heard of her until twelve years after he bought the land. The fact is also that the land, when Mr. Robinson bought it in 1894, was worth no more than he paid for it, $6,000,

that it was worth when Mr. Bishop bought it in 1893 no more than he paid for it, $4,700, and that in 1873 Mrs. Bishop originally bought it and many other more valuable lands together for $300, when there was no possible question about the title. (Tr., p. 75.) When Mr. Robinson bought he already held a 50-year lease of the land at an annual rental of $700, a preceding lease at $175 having expired shortly before. That would not indicate that the land was very valuable.

The value of land then was usually estimated at eight times the annual rental, and this is still often the case. As to the consideration which he received for his conveyance to the defendant, $150,000 in stock, which, instead of being several times that value, was of such uncertain value that no sugar agency in Hawaii could be induced to float the company, it was fully explained by the evidence below, which showed, among other things, that, as the deed itself shows (Tr., p. 99) the consideration which Mr. Robinson received was based in large part on the improvements which he had placed on the land. And what could be more ridiculous than that the defendant gave the large consideration because of the warranty! Would the defendant pay that consideration by way of insurance of a defective title, getting that insurance only by way of an individual's covenant of warranty, and then, too, proceed to place, as the evidence below shows, upwards of $600,000 of improvements on the land in the shape of artesian wells and pumping plants (Tr., p. 77), besides intending, as the evidence below shows, to put a million-dollar or so mill on the land. The evi-

dence below also showed that no question as to the validity of the title was raised when the defendant bought the land and that the defendant did not know of the existence of the plaintiff or her claim until many years later. All which goes to show that the plaintiff is in no position to ask this court to disturb the decision below on the facts, which the lower courts had before them and which this court can only conjecture.

If any inference is to be made from the facts, it would seem to be that the court should be slow to support such a claim as is now set up by the plaintiff as against a title which has been so long unquestioned and in reliance upon which the defendant and its predecessor in title have expended in improvements probably at least three quarters of a million dollars.

Apologizing for the length to which we have felt constrained by plaintiff's brief to go in clearing the way, we now proceed to the argument of the real questions in the case.

ARGUMENT.

I.

THE JUDGMENT BELOW SHOULD BE AFFIRMED UPON THE AUTHORITY OF *BOEYNAEMS* v. *AH LEONG,* 242 U. S. 612.

Before the comparatively recent transfer of jurisdiction, from the Federal Supreme Court to this court, of appeals and writs of error from the Supreme Court of Hawaii in certain classes of cases, the Federal Supreme Court had held in a long series of cases

from Hawaii as well as from Porto Rico and other jurisdictions that, except in a clear case of error, it would not disturb the judgments of local courts in cases which depend largely upon local statutes, history, usage, experience or understanding; and in the recent case of *Boeynaems* v. *Ah Leong,* 242 U. S. 612, that court not only reaffirmed this rule but held in the most emphatic way that it applied to that case, so much so that the court in its decision did not refer to the merits of the case at all and affirmed the judgment of the Supreme Court of Hawaii solely on the ground that it was of a local nature. The entire decision of the Federal Supreme Court was as follows:

> "Judgment affirmed with costs upon the authority of *Lewers & Cooke* v. *Atcherley,* 222 U. S. 285, 294; *John Ii Estate* v. *Brown,* 235 U. S. 342, 349; *Kapiolani Estate* v. *Atcherley,* 238 U. S. 119, 136; *Cardona* v. *Quinones,* 240 U. S. 83, 88."

The cases cited and the passages on the particular page referred to in them show that the court disposed of the case solely upon this view. A petition for rehearing for the purpose of having the merits considered was denied.

The *Boeynaems* case in the Supreme Court of Hawaii (21 Haw. 699), which, as already stated, merely followed the *Nahaolelua* case (20 Haw. 372) was, as we view it, precisely like the present case (23 Haw. 747) in this respect, and therefore the decision of the Federal Supreme Court in that case is, we submit, controlling in this case. The same questions were involved in that case and in this. First,

would the estate (conveyed in that case, devised in this) be an estate tail in Hawaii, if such an estate could exist in Hawaii? In each case this question was decided in the affirmative. Secondly, since estates tail cannot exist in Hawaii, would the estate be a fee simple or a life estate and remainder? In each case this question was decided by the application of the same principle, namely, that the estate would be a fee simple or a life estate and remainder according to which would go more nearly towards carrying out the intention of the grantor or testator. The court held in one case that the estate would be a life estate and remainder and in the other that it would be a fee simple because of the difference in the facts to which this principle was applied. In both cases the same local statutes, history, usage, experience and understanding were involved and the same principles were applied, the court coming to opposite conclusions in the two cases solely because of the difference in the facts. The present case is the stronger of the two for the application of the rule against disturbing decisions of a local nature, because, as we propose to show, the decision in this case is supported by all applicable and analogous decisions in other jurisdictions, while the decision in the *Boeynaems* case finds no support in any other jurisdiction.

In the *Boeynaems* case in the Federal Supreme Court the attorney who successfully urged that the decision below should not be disturbed because of its local nature was the same attorney who in the present case seeks to have the decision below reversed. In

his printed brief, filed in the Federal Supreme Court in that case, he based his argument in part upon local statutes, in part upon local decisions, and in part upon decisions of the Federal Supreme Court supporting the rule against disturbing decisions of a local nature.

The local statutes referred to by him in that brief were: (1) Section IV of Chapter I of the Act of 1847, which provided that "The reasoning and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this Kingdom," and Section XIV of Chapter III of the Civil Code of 1859, which authorized the courts to decide according to reason and equity and provided that "to decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries," which provisions were in force when the deed involved in the *Boeynaems* case and the will involved in the present case were made; (2) the Act of 1892 (now Revised Laws of Hawaii, 1915, Sec. 1, enacted after the deed and will were made), which adopted the common law "except as otherwise * * * fixed by Hawaiian judicial precedent, or established by Hawaiian usage"; and (3) Sections 1447 and 1448 of the Civil Code of 1859 (now Revised Laws, 1915, Secs. 3243 and 3246) prescribing the course of descent of property from intestates, which were relied on mainly in *Rooke* v. *Queen's Hospital,* 12 Haw. 375,

391-392, for holding that estates tail cannot exist in Hawaii.

The Hawaiian decisions referred to by him were those intended to show how far the courts of Hawaii had gone in basing their decisions on local usage and conditions and which held in particular that a seal is not necessary to the validity of a mortgage or a deed (*Wood* v. *Ladd,* 1 Haw. 17; *Campbell* v. *Manu,* 4 Haw. 459), or a bond (*In re Congdon,* 6 Haw. 633); that dower may be had in leasehold estates of long duration (*In re Vida,* 1 Haw. 63); that future estates may be conveyed (*Kuuku* v. *Kawainui,* 4 Haw. 515, 517; *Puukaiakea* v. *Hiaa,* 5 Haw. 484, 486); that the words "heirs" and "assigns" are not strictly necessary to carry a fee simple (*Branca* v. *Makuakane,* 13 Haw. 499, 504, 505); that a conveyance to two or more in the absence of a contrary intention created a tenancy in common (*Awa* v. *Horner,* 5 Haw. 543); that the rule in Shelley's case is not in force in Hawaii (*Thurston* v. *Allen,* 8 Haw. 392; *Robinson* v. *Aheong,* 13 Haw. 196; *Estate of Holt,* 19 Haw. 78; *Evans* v. *Bishop Trust Co.,* 21 Haw. 74); that conveyances may be made in disseisees (*In re Kealiiahonui,* 9 Haw. 6; *Mossman* v. *Hawaiian Government,* 10 Haw. 421; *Ninia* v. *Wilder,* 12 Haw. 104; *Brown* v. *Spreckels,* 18 Haw. 91; *Spreckels* v. *Brown,* 212 U. S. 208); that choses in action and rights of entry are assignable and livery of seisin unnecessary (*Lathrop* v. *Wood,* 1 Haw. 71; *Henrique* v. *Paris,* 10 Haw. 408); that contingent remainders will not in all cases be defeated through the merger of estates

(*Evans* v. *Bishop Trust Co.*, 21 Haw. 74; *Godfrey* v. *Rowland*, 16 Haw. 377); that fees tail and fees simple conditional do not exist in Hawaii (*Rooke* v. *Queen's Hospital*, 12 Haw. 375); and that the tendency is to reject English rules of property if not in accord with the times and to follow the intent of the testator or grantor (*Rooke* v. *Queen's Hospital*, 12 Haw. 375; *Thurston* v. *Allen*, 8 Haw. 392; *Simerson* v. *Simerson*, 20 Haw. 57; *Chater* v. *Carter*, 22 Haw. 34; *Nahaolehua* v. *Heen*, 20 Haw. 372; *Kaleleonalani* v. *Crown Land Commissioners*, 6 Haw. 454).

The cases cited by him in support of the rule of the Federal appellate courts against disturbing a decision of a local nature were: *Spreckels* v. *Brown*, 212 U. S. 208; *Lewers & Cooke* v. *Atcherley*, 222 U. S. 285; *Kapiolani Estate* v. *Atcherley*, 238 U. S. 119, 136; *De la Rama* v. *De la Rama*, 241 U. S. 154; *Montelibano* v. *La Compania Tobacos*, 241 U. S. 455; *Cardova* v. *Folgueras Y. Rijos*, 227 U. S. 375; *Work* v. *United Globe Mines*, 231 U. S. 595, 600; *Luhrs* v. *Hancock*, 181 U. S. 567, 571; *Kealoha* v. *Castle*, 210 U. S. 149; *Luke* v. *Smith*, 227 U. S. 379; *John Ii Estate* v. *Brown*, 235 U. S. 342; *Hapai* v. *Brown*, 239 U. S. 502; *Jones* v. *Springer*, 226 U. S. 148; *Lewis* v. *Herrera*, 208 U. S. 309; *Crary* v. *Dye*, 208 U. S. 515; *Clason* v. *Matko*, 223 U. S. 646.

We present this resumé of opposing counsel's argument in that case, partly in order to show precisely the argument upon which the Federal Supreme Court based its decision in that case and that there is no difference between the two cases in this respect, and

partly in order to adopt the argument as an equally persuasive argument to this court.

The argument to show that the present case is of a "local nature" is greatly strengthened by much that opposing counsel states in his brief in this case (see particularly pages 16-21, 36-43 of his brief), which *mirabile dictu,* he states for the avowed purpose of inducing this court to revise the decision of the local court especially as to the matters which are of a local nature.

We submit therefore (1) that the decision of the Federal Supreme Court in the *Boeynaems* case is precisely in point and controlling in the present case, to the effect that the decision below is such that it should not be disturbed, and (2) that, even if this court should not regard that decision as absolutely controlling in this case, it should nevertheless itself apply to this case the rule against disturbing decisions of a local nature except in the clear case of error and should give great weight to the decision of the local court.

II.

ALL PERTINENT CONSIDERATIONS COMBINE TO SHOW THAT THE DEVISE IN QUESTION WOULD CREATE A FEE TAIL IF FEES TAIL COULD EXIST IN HAWAII.

Coming now to the merits of the case, we propose to show in this part (II) of this brief that all matters bearing on the question—the use of the aptest technical

words, all applicable presumptions, the frame of the sentence and all parts of the will taken as a whole—point in the same direction and combine to make the strongest possible case for a fee tail as against a life estate and remainder; and to show in the next part (III) of this brief that the matters relied upon by opposing counsel to show that a life estate and remainder was intended not only do not show that, but on the contrary support the theory of a fee tail.

In considering these questions we invite reference to the full copies of the will and codicils set forth in the transcript (pp. 78-92) or, more conveniently, to the brief synopsis of the will and codicils set forth in the appendix at the end of this brief.

1. *The aptest technical words are used for the creation of a fee tail.*

The devise is to Kahakuakoi and Kealohapauole, her husband, "and to the heirs of the body of either."

It is elementary that the words "and heirs" and "and heirs of the body", following a gift to named grantees or devisees, are the ordinary, natural, technical words used to denote an estate of inheritance (in the one case a fee simple and in the other a fee tail), and that there is such a strong presumption that when these words are used they are used for that purpose, that to give them a different construction would be to hold that they are used in an abnormal sense; also that their function is not to indicate an intention to benefit or give an estate to "the heirs" or "heirs of the body", but merely to indicate the nature or character of the estate in respect of *quantum* of interest intended to be

given to the first takers. In short, they are words of inheritance or limitation and not of purchase.

In these respects the words "heirs of the body" are even stronger than the word "heirs" and less capable of having their technical meaning overcome by other context. (Hawkins, Wills, *183-184.)

A few cases will be cited, first to illustrate the potency of these words in these respects in other jurisdictions and then to show that it is the same in Hawaii.

In *Hunter* v. *Watson,* 12 Cal. 363, a case of a fee simple, the conveyance was to K and his heirs, but as K happened to be dead, it was held that the deed was a nullity; for K himself could not take because he was dead, and the "heirs" could not take because, as the court said (p. 377), that word

> "is not a word of purchase, carrying title to the heirs, but only qualifying the title to the grantee."

In *Burnett* v. *Burnett,* 17 S. C. 545, a case of a fee simple conditional, which instead of a fee tail is held to exist in South Carolina, the conveyance was to a daughter "and the lawful heirs of her body * * * or to the trustees for her and her heirs' use and benefit." The court, referring to a contention that the provision for trustees and the use of the word "heirs" instead of "heirs of the body" in the second instance controlled the words "heirs of her body" in the first instance so as to make a life estate and remainder, said at page 549:

> "These are the apt words to create an estate in fee conditional, and we are unable to discover

anything in the terms of this deed to take this case out of the well-settled rule",

and further, at page 551:

> "The fundamental difference between an estate in fee conditional, after the condition has been performed, and an estate in fee simple, is, 1st, That in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs the estate reverts to the donor; 2nd, That the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In a grant of an estate in fee conditional, heirs of the body are not named on account of any benefit intended for them or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent, in case no such disposition is made. In the case of a fee simple estate the law prescribes that the estate shall descend to the heirs generally, in case the ancestor makes no disposition of the estate, while in the case of an estate in fee conditional the instrument creating the estate confines the descent to a particular class of heirs. Both classes of heirs take by succession from the ancestor."

In *Pearsol* v. *Maxwell,* 68 Fed. 513, a case of a fee tail, the devise was to E, *habendum* to E "and the heirs of her body", with gifts over in certain events, which it was contended controlled the words "heirs of her body", so as to create a life estate and remainder. The court, however, held otherwise, saying, at page 514:

> "These are the aptest words for the creation of an estate tail. Standing alone they would admit

> of no other interpretation. When, after the devise of the land to Edith, the testator subjoined the words, 'to have and to hold the same to the said Edith Pearsol and the heirs of her body', it is difficult to conceive how he could have had in view any other purpose than thereby to define the *quantum* of estate which she would take. * * * The presumption, of course, is that the words were employed in their technical meaning. * * * Now, 'heirs of the body' are strictly and technically words of limitation. 'Nothing can convert them into words of purchase but a clearly expressed intention of the testator to use them in an abnormal sense'. * * * 'the intent not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it.'"

On appeal in the same case, 76 Fed. 428, the Court of Appeals said:

> "That these words, if alone considered, created an estate tail, is hornbook law."

And, to the argument that in a will technical words yield to intention as disclosed by the entire will, the court replied, true, but,

> "Even in a will the presumption is that technical words have been used in their technical sense and this presumption cannot be rebutted otherwise than by showing an unequivocally expressed intent to use them in some other sense."

In a will, of course, the use of the word "heirs", although advisable, is not always or strictly necessary to create a fee simple even at common law (2 Jarman, Wills, 5th ed., *274), but when it is used in a will it has the same significance as if its use were

necessary. In Hawaii the same is true of deeds as well as wills. (*Branca* v. *Makuakane,* 13 Haw. 499, 506; *Kaleialii* v. *Sullivan,* 23 Haw. 38, 44.)

In *Thurston* v. *Allen,* 8 Haw. 392, the court, speaking of the use of the word "heirs" in Hawaiian Land Patents to denote a fee simple, said (p. 402):

> "It was introduced to define the character of the estate in the patentee." (See also page 397.)

In *Robinson* v. *Aheong,* 13 Haw. 196, a fee simple case, the court, referring to the words "and to their heirs forever" in a will, said (p. 199):

> "The word 'to' before 'their heirs' is not sufficient to show that the heirs were to take by way of remainder. Those words must be regarded as words of limitation and not of purchase, although the rule in Shelley's Case is not in force here."

In *Ninia* v. *Wilder,* 12 Haw. 104, a case of a qualified fee simple, in which the devise was to certain persons "and their heirs and representatives forever", with gifts over in certain contingencies, and in which it was contended that the devise created only life estates and remainders, the court said (p. 108):

> "These are apt and proper words for the conveyance of the estate in fee and the intention to give the fee could not have been more adequately expressed if every word in the English language had been employed."

In *Rooke* v. *Queen's Hospital,* 12 Haw. 375, a case of a fee tail, where the devise was to Emma "to be used and enjoyed by her during the term of her natural life, and her children forever", with a gift.

over in the event of her death without leaving any issue, "children" was held to be the equivalent of "heirs of the body" from which it followed that Emma took an inheritance notwithstanding the reference to "the term of her natural life", the court saying (p. 380):

> "Whether she would take an estate tail or not would depend upon whether 'children' as used here would be considered a word of purchase or a word of limitation. It would be a word of limitation if it were a *nomen collectivum,* meaning 'issue' in its broader sense of 'heirs of the body' or offspring of every degree, denoting what estate Emma was to have and that the children were to take, if at all, through her by descent, and not directly under the will."

In *Nahaolehua* v. *Heen,* 20 Haw. 372, another case of a fee tail, the court said (p. 376):

> " 'The technical language to create an estate tail is to limit the estate to a man and the heirs of his body,' * * * The phrase, 'the heirs of his body' as used in the deed, are therefore, the appropriate words to create an estate tail. They are words of inheritance, as well as apt words of procreation, which are essential to the creation of an estate tail."

Finally, in the present case (*Kinney* v. *Oahu Sugar Company,* 23 Haw. 747, 752-753; Tr., pp. 46-48), the Supreme Court of Hawaii sets forth these principles in a commendably clear, accurate and complete manner, with references to text books and to Hawaiian and other cases.

Somewhat similarly as to the use of the word "successors" in *Bishop of Zeugma* v. *Paahao,* 16 Haw.

345, in which a deed was made to a bishop and his "successors in office" and in which it was contended by counsel that the Bishop was an ecclesiastical corporation sole so that upon his death his successor would take, but held by the court that the Bishop was not a corporation and that his successor therefore could not take by succession and also that since the word "successors" in the deed was a word of limitation he could not take by purchase, saying (p. 348):

> "The word 'successors' as here used, is a word of limitation and not of purchase. The present bishop could not take under that deed by way of remainder."

2. *All applicable presumptions favor a fee tail as against a life estate and remainder.*

The presumption that "heirs of the body" are used as words of inheritance and the strength of that presumption have just been shown, especially in the *Pearsol* case. But there are other presumptions that operate to the same end. One of them is mentioned also in the *Pearsol* case (68 Fed. 513, 515):

> "The rule is to regard the first taker as the preferred object of the testator's bounty, and in doubtful cases the gift is to be construed so as to make it as effectual to him or her as possible."

Perhaps we cannot do better than to sum up most of these presumptions, which are of a familiar nature, in the language of the court in *Smith's Appeal,* 23 Pa. St. 9, 10-11, in which it was held that what would be a fee tail in personal property, if such an estate could exist in that kind of property, was an absolute estate

and not a life estate and remainder, since estates tail cannot exist in personal property.

> "To construe it a life estate in the first takers would be to prefer the second takers, who are unknown, to the first, who are known, contrary to the rule which prefers the primary to the secondary objects of the testator's bounty. * * * In cases of doubtful construction the law leans in favor of an absolute, rather than a defeasible estate; of a vested rather than a contingent one; of the primary, rather than the secondary intent; of the first rather than the second taker, as the principal object of the testator's bounty; and of a distribution as nearly conformed to the general rules of inheritance as possible."

Such presumptions are recognized in Hawaii as well as elsewhere. See *Hemen* v. *Kamakaia,* 10 Haw. 547, 557, and the present case (23 Haw. 747, 760; Tr., p. 57).

In the lower court opposing counsel advanced one presumption as favoring the plaintiff's case, namely, that a testator will be presumed to have intended a legal estate rather than an illegal one. His brief, pp. 30-43, 69-70. This contention was well met by the decision of the Supreme Court (23 Haw. 747, 756; Tr., pp. 51-52.) The court held that such a presumption could not control when, as in the present case, the language of the will showed unmistakably that the intention was to create a fee tail; also that the presumption would have little force when, as in this instance, the will was made sixteen years before it was decided that estates tail could not exist in Hawaii and when there was an impression that such estates could

exist there. As to this, see pages 16-19 above. We may add that such a presumption does not favor one legal estate as against another legal estate. If it would operate at all, it would operate as much in favor of a fee simple as in favor of a life estate and remainder. The cases cited by the plaintiff on this general subject obviously are not applicable to the facts of this case. The Supreme Court of Hawaii and the courts in the several states have not hesitated to hold that an estate tail was intended when the language called for such construction, notwithstanding that such estates could not be created. (See Subdiv. 1 of Part II above and Subdv. 3 of Part IV below.)

3. *The Present nature of the devise and the absence of words of separation or futurity strongly indicate an estate of inheritance.*

The devise is "unto them and to the heirs of the body of either." This is a single unbroken clause in the present tense and without the slightest indication either that the first takers were to take only for life or that the heirs of their bodies were to take "after the decease" of the first takers or in "remainder."

The heirs of the body could not take immediately (concurrently), for they were not in existence as heirs, that is, they were not yet ascertained, and they could not take in remainder because the gift was immediate. Hence, the only way they could take would be by inheritance through the parents—by holding that the latter took an estate of inheritance.

The same would be true even if the gift were ex-

pressed to be to the parents for life. For, while the absence of the words "for life" or their equivalent are significant as negativing an intention to give only a life estate, their presence is not very significant as showing an intention to give only a life estate, except in connection with other indications, for they would have the estate for life anyway, whether only for life or in fee. But the absence of such words of separation or futurity as "after their decease" or "remainder" are especially significant, and the more so since the testatrix used both of those expressions so many times in other items of the will and codicils to indicate her intention to give a life estate and remainder, as will be pointed out more fully in the next subdivision of this brief. In this instance, there is an absence of both classes of expressions, namely, "for life" and "after their decease" or "remainder."

These features were considered somewhat fully in *Rooke* v. *Queen's Hospital,* 12 Haw. 375, in which the devise was (1) to the testator's wife "to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease" (2) to his daughter "to be used and enjoyed by her during the term of her natural life, and her children forever," with a gift over in certain events. It was held that the daughter would take an estate tail at common law, notwithstanding that the devise was "to be used and enjoyed by her during the term of her natural life," notwithstanding that the wording of the limitation was "children" instead of "heirs of the body" and notwithstanding that the two classes of

beneficiaries were separated by a comma. Among other things the court said:

At page 381, referring to *Wild's Case,* 6 Rep. 17:

> "It was further resolved that in the case of a devise simply to A and to his children or issue, without the words 'after his decease' or their equivalent, if he had children at the time of the devise, he and they would take jointly for life, that being the manifest intent and there being nothing to prevent its taking effect, but that if he did not have children at the time of the devise, he would take an estate tail, since there was a manifest intent that the children or issue should take, and as immediate devisees they could not take, because they were not in *rerum natura,* and by way of remainder they could not take, for that was not the intent, because the gift was immediate, and therefore A would take an estate tail and 'children' would be a word of limitation."

At page 385:

> "And as we have seen by the decision and the first resolution in *Wild's Case* the presence of the words 'after their decease' was deemed sufficient to negative the idea of an estate tail, whether there were children at the time of the devise or not, but by the rule in that case, where such words were absent, although the word 'to' was present, the existence or non-existence of children at the time of the devise determined whether the children should take with their parents jointly or the parents take an estate tail. That the children would take a remainder was considered out of the question.
>
> "The absence of such words as 'after her decease' following the devise to Emma and preceding that to her children is the more significant here from the fact that the testator had already

used similar words to separate the devise to Emma from that to his wife, namely, the words 'and from and immediately after her decease'."

At page 385 again:

"As the devise to the children stands, it is immediate, to take effect upon the death of the testator, but since there were no children at the time of the devise, it could not have been intended as a direct devise, for if it was, the children if born after the death of the testator could not take at all—which clearly was not the intention. Such words as 'after her decease' are natural and usual where a remainder is intended and great weight is always placed upon their presence to show that the words following were intended as works of purchase, and likewise great weight is properly placed upon their absence as tending to show that the following words were intended as words of limitation."

At page 387:

"The form of the sentence favors the argument that the words in question were not intended to limit Emma's estate to her life and give her children a direct fee simple, for, as already pointed out, there is no break indicated by such words as 'after her death' or 'in remainder to' or by the repetition of the words 'I give and devise' or even the word 'to.' The devise is to Emma '* * * to be used and enjoyed by her during the term of her natural life, and her children forever,' as if the testator were merely expressing what estate was given to Emma or how it should be enjoyed, namely, by her during her life, and by her children forever, in other words, as if he intended this as merely a *tenendum* clause."

At page 387, also, the court refers to a leading case on this subject as follows:

> "In *Kendall* v. *Clapp,* 163 Mass. 69, the devise was to the testator's wife, 'for her sole use and comfort during her natural life, and to her heirs and assigns forever'. After remarking that the words 'heirs and assigns' are the usual technical words to signify a fee, the court said, 'the absence before the words 'to her heirs and assigns forever' of technical phrases, such as 'after his death,' or 'in remainder', commonly employed to denote a devise or gift in remainder, and also the fact that the whole limitation is in an unbroken sentence, lead to the same result."

See also the reference on pages 388-9 to a decision by Judge Story.

See also *Oxford* v. *Clifton,* 1 Eden 473 (28 Eng. Reprint 768).

The distinction between a devise containing such words of separation or futurity and one which does not, is pointed out by Jarman even in cases in which the more flexible term "issue" is used instead of "heirs of the body."

> 2 Jarman, Wills, 5th Ed., 414.

In the present case, the Supreme Court of Hawaii recognized the significance of the absence of words of separation or futurity. (23 Haw. 747, 754; Tr., p. 50.)

Opposing counsel contends (his brief, pp. 26-27, 48) that "and to" are words of demarcation or separation. Nothing, however, is commoner than the insertion of "to" in devises and deeds "to A and *to* his heirs" or "to A and *to* the heirs of his body." These expres-

sions are always regarded as the equivalent of similar expressions without the insertion of "to." For examples, see *Kendall* v. *Clapp,* just referred to as followed in the *Rooke* case, and *Robinson* v. *Aheong,* quoted from on page 33 above, and *Huntley's* case at page 71 below.

To separate an unbroken devise, such as to A and the heirs of his body, into a life estate and remainder would be on a par with uniting, by the rule in *Shelley's Case,* a separated devise, such as to A for life and after his death to the heirs of his body, into a fee tail. It would amount to an adoption of a sort of reverse of the rule in *Shelley's Case,* thereby equally subverting the intention. The rule in *Shelley's Case,* because it usually thwarted the intention, was held not to obtain in Hawaii. (*Thurston* v. *Allen,* 8 Haw. 392, since followed in a number of cases.)

4. *An intention to give an estate of inheritance is clearly shown by the will and codicils taken as a whole.*

The testatrix could not, if she had tried to, have framed either the two items directly in question or the will and codicils as a whole so as to show more clearly both that she intended the devise to be solely to Kahakuakoi and Kealohapauole and that she intended it to be an estate of inheritance. (It had not then been decided that a fee tail could not exist here.) Indeed, as the Supreme Court of Hawaii recognized in this case (23 Haw. 747, 756; Tr., p. 52), it was

supposed at that time that such an estate could exist here. (See pages 16-19, 36 above.)

She began her bounties to these people (see synopsis in the appendix of this brief) by giving (Will, Item 5) an annuity to "Kahakuakoi (w) and Kealohapauole, her husband", and to them alone and by name, jointly for life—with marked explicitness. She then added, *"And I also devise unto them* and to the heirs of the body of either", showing that she was making an additional gift solely to the same people—this time, however, an estate of inheritance instead of for life. Then (1st Codicil, Item 2) she revoked so much of the 5th Item of the will "as devises the land" therein named "to Kahakuakoi (w) and Kealohapauole," showing that she understood that she had made the devise to them and to them alone. "And in lieu thereof," she proceeded, that is, in lieu of the earlier devise to Kahakuakoi and Kealohapauole, she gave "unto said Kahakuakoi (w) and Kealohapauole (k)" alone another piece of land; "to have and to hold," that is, these same people and these alone were to have and to hold—a regular *habendum* clause applicable solely to the named devisees; and these were to have and to hold "as limited" in the fifth item of the will, showing that she regarded the words "heirs of the body of either" in that item as purely words of limitation, defining the quantum of interest given to the named devisees. Opposing counsel endeavors to obtain support from the words "as limited." The most that he reasonably could contend is that these words do not affect the

nature of the devise either way. We submit, however, that the established meaning of "limited" is such as to emphasize the idea of words of limitation. (See decision of the Supreme Court, 23 Haw. 747; Tr., p. 50.)

In line with the foregoing, we quote again from the *Pearsol Case* (68 Fed. 513, at 515):

> "Still further, the language of the testator—'the part of my farm above devised to Edith Pearsol contains one hundred and seventy-five acres'—is very significant. It clearly evinces that in the mind of the testator Edith was his sole devisee of this land."

The other provisions of the will and codicils show that the testatrix knew precisely how to make gifts of various kinds by the use of apt language, and particularly that she knew how to create life estates and remainders. As the trial court (the Circuit Court) said (Tr., pp. 33, 34):

> "If there is one thing above all others that is shown by this will and codicils it is that the testatrix knew how, when she so desired, to grant a life estate. There are no less than fifteen estates for life created by this will. * * * It is equally plain that the testatrix knew how to devise land by proper words to reach the result claimed by the plaintiff herein to have been her intention in the case at bar. * * * I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail."

See also, more fully, the decision of the Supreme Court, 23 Haw. 747, 751; Tr., p. 46.

In several instances annuities were given for life, the testatrix in each instance stating that the annuity was "during her life" when it was to one, or so much "each * * * during the term of the natural life of each of them" when it was to two severally, or to them and "the survivor of them * * * so long as either of them may live," when it was in form to two for their joint lives with the right of survivorship, etc., according to the circumstances. (Will, Items 5, 6; 1st Codicil, Item 10.)

In numerous instances life estates and remainders were given in lands. The part of the devise which was for life was in every case expressed to be to a named person "to have and to hold for and during the term of his (or her) natural life," except in one instance, when it was "to hold for his life." (Will, Items 4, 7, 8, 9, 10, 15; 1st Codicil, Items 2, 3, 4, 5, 6, 13; 2nd Codicil, Items 1, 2, 3.) The part of the devise which was in remainder was expressed to be either (a) "and after his (or her) decease to my trustees" or "and upon his (or her) decease to my trustees" or "upon his (or her) decease to my trustees" (Will, Items 4, 7, 8, 9, 10, 15; 1st Codicil, Item 2), or else (b) "remainder to my trustees." (1st Codicil, Items 3, 4, 5, 6, 13; 2nd Codicil, Items 1, 2, 3.) In three instances, the testatrix showed that she knew how to use apt language to produce just such a result as the plaintiff asks the court to hold was produced by the devise in question, that is, how

to give an estate jointly or by entirety to husband and wife with right of survivorship for life with a remainder over. In each instance the devise was to two named persons "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees." (1st Codicil, Items 4, 5, 6.)

So, on the other hand, as to absolute estates, whether of personal estate "to have and to hold to him, his executors, administrators and assigns forever" (Will, Item 16) or of real estate "to have and to hold with the appurtenances to him, his heirs and assigns forever" (1st Codicil, Item 9), or of real and personal estate to trustees "their heirs and assigns forever" upon certain trusts. (Will, Item 13.)

So, in the devise in question, she could have had no other intention than to devise a fee tail.

To quote still again from the *Pearsol Case* (68 Fed. 513, at 514):

> "It is to be noted that there are no words whatever in this will to restrict Edith's estate to her lifetime. Had that really been the intention of the testator, he surely would have so expressed himself. He knew very well how to do this; for, making provision in favor of Sarah Wellington, he provided that 'she is to have a life estate in the first room of my mansion.' "

See, also, *Snyder* v. *Baker,* 5 Mackey (D. C.), 443, 456.

It will be noticed, also, that in every instance of an express remainder, the remainder is given to the trustees. It is very unlikely that the testatrix would have

selected the indefinite "heirs of the body" of the named beneficiaries in the particular devise in question, without any apparent reason, to be remaindermen, and especially as she named the trustees as the remaindermen or devisees over in the same item; nor is it likely that she could have intended to make the "heirs of the body" remaindermen in any such obscure way by implication as is contended for by the plaintiff when in all other instances she created remainders by the clearest possible language. (See decision of the Supreme Court, 23 Haw. 747, 756; Tr., p. 51.)

Again, in Item 16 of the First Codicil the testatrix empowers,

> "all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent, however, after such decease to be paid to my executors or trustees."

Hence, if the Court should hold that Kahakuakoi and Kealohapauole took only a life estate, whether at common law or as a substitute for an intended estate tail, they or the survivor of them just before death might have made a ten-year lease which would have continued valid after death, but the rent under which would after death go to the trustees and not to the "heirs of the body". That would be the inevitable result if the plaintiff's claim that they took

only a life estate should be sustained. Could anything be more absurd? The testatrix could not have had the remotest suspicion that anyone might ever be found so bold as to contend that she had given Kahakuakoi and Kealohapauole only a life estate with remainder to the heirs of their bodies but with power on their part to make a lease that would continue in force after their deaths, *but the rents from which would until the termination of the lease go to the trustees and not to the remaindermen.* See decision of the Supreme Court, 23 Haw. 747, 756; Tr., p. 51. Plaintiff's counsel concedes (see page 88 of his brief) that, at least at first sight, this would militate against his theory of a life estate and remainder. He then endeavors to meet it by assuming the very thing he has to prove (that the first takers took only a life estate anyway) and, worse still, by assuming that the Court itself so held, and then dogmatically saying that the heirs of the body instead of the trustees would take the rents after the death of the first takers notwithstanding this provision!

III.

THE MATTERS RELIED ON BY THE PLAINTIFF IN SUPPORT OF HER THEORY OF A LIFE ESTATE AND REMAINDER NOT ONLY DO NOT SUPPORT THAT THEORY BUT ADD MATERIAL SUPPORT TO DEFENDANT'S THEORY OF AN ESTATE TAIL.

So conclusive are the reasons already given to show that the estate would be a fee tail, if a fee tail could

exist in Hawaii, that in order to overcome them the plaintiff would have to find some arbitrary, unyielding rule of law that would apply irrespective of the intention, or else find something else in the will that would show a contrary intention in the most unmistakable manner. In her quest for the latter, she seizes on the word "either" and the devise over "upon default of issue" in the fifth item of the will and, more feebly, on the words "and to" in the same item and the words "as limited" in the eleventh item of the first codicil. But these, we submit, clearly avail her nothing but on the contrary militate against her. The words "and to" and "as limited" have already been considered (pages 41 and 43-44 above.) "Either" and the devise over "upon default of issue" will now be considered.

1. *The word "either" not only does not militate against but substantially supports the theory of an estate tail.*

(a) Plaintiff's counsel in casting about for authorities to support his novel theory that somehow or other the word "either" has the effect of splitting the estate in two so as to make a life estate in the first takers and a remainder in fee simple in the heirs of their bodies, fastened upon a group of cases that have to do with "superadded words of limitation" as discussed in 2 Jarman, Wills, 359-363.

A superadded limitation is of course a second limitation added to the first limitation, as, to A for life and after his death to the heirs of his body and the heirs male of their bodies. It tends to show, when it is

different from and narrower than the first limitation, as in the example just given, that the class mentioned in the first limitation was intended to be a new stock or starting point, especially if there are words of futurity or separation between the first takers and the first limitation, as in the same example. The superadded or second limitation is supposed to show how the descent is to go from the class mentioned in the first limitation—not how it is to go from the first takers—and thus make a change in the course of descent, the course from the second to the third takers being different from that from the first to the second.

Accordingly, in the Circuit Court, plaintiff's counsel, in order to make this case fit the group of authorities found by him, contended that "either" is a superadded word of limitation. He even convinced that Court that it is. But that Court nevertheless held that the rule as to superadded words of limitation is not a hard and fast one, but only a rule of construction, and that the case was so clear for an estate tail that it could not be overcome by even a superadded limitation, Tr., pp. 35-36.

Of course, the circuit judge was in error in holding that "either" is a superadded limitation, and hence our case is all the stronger for an estate tail, for there remains nothing whatever looking in the direction of a life estate and remainder. The function of "either" is not to indicate how the descent is to go from those mentioned in the first and only limitation. It has to do with descent to, not from, the heirs of the bodies of the first takers. Its function is solely to indi-

cate the course of descent from the first takers, that is, whether the "heirs of the body" mentioned in the only limitation there is, are to be the heirs of the body of one or of the other of the first takers or of the survivor of them or of their joint bodies or of either or each whether by the other or a later spouse. It has to do with the source from which the only mentioned heirs of the body spring. Accordingly in his brief in the Supreme Court, plaintiff's counsel abandoned his theory of a superadded limitation, but endeavored to obtain the benefit of its underlying principle and of the same group of authorities, and so he claimed that "either" would at least cause "a change in the course of descent". But upon our showing in our brief that "either" no more would cause a change in the course of descent than it would be a superadded word of limitation, he, in his argument in the Supreme Court as in his brief in this Court, practically abandoned also his theory of a change in the course of descent and advanced a third theory of "explanatory and qualifying" words. He, however, is still obliged to rely on the same group of authorities, such as *Daniel* v. *Whartenby,* 17 Wall. 639; *Green* v. *Green,* 23 Wall. 486; *De Vaughan* v. *Hutchinson,* 165 U. S. 566, and *Luddington* v. *Kime,* 1 Ld. Raym. 203. (His brief, pages 59-60.) Thus, he is in the awkward position of being under the necessity of supporting his theory without having the usual necessary basis of "superadded words of limitation", and at the same time of being obliged to rely upon authorities which depend upon such superadded

limitations. It is like trying to make bricks without straw. Not only are there superadded limitations in the authorities upon which he relies, but usually there are words of futurity and separation and usually the real question has been whether the rule in *Shelley's Case* applied or not, that is, whether there were "explanatory or qualifying" expressions enough to take the case out of that rule, and in most of the cases there have been other special features. Jarman, moreover, says, *ubi supra,* that even where there are superadded words of limitation, they do not have the effect contended if they are either the equivalent of or broader than, as distinguished from narrower than, the words of the first limitation; and yet the only effect that the plaintiff claims for "either" is that it broadens the scope of "heirs of the body". No wonder the Supreme Court found against him on this point. (Tr., pp. 48-49.)

(b) Why strain to give "either" some occult or ulterior or conjectured meaning or effect for the purpose of overcoming the otherwise plainly expressed intention of the testatrix? Why not construe "either" naturally? We entirely agree with opposing counsel that "either" has the effect of enlarging the "heirs of the body" from those of the body of each by the other alone to those of the body of each by any spouse. This fully accounts for its use. It is all the explanation that is required. Any other explanation would be conjectural and even fanciful and arbitrary. The effect is, therefore, to make the estate an estate tail general instead of an estate tail special, as, it is agreed,

it would otherwise be. This is the view taken by the Supreme Court. (Tr., p. 49.)

If "either" has any other effect, it is, as shown in the opening statement of this brief, to separate the estates longitudinally as between the two first takers so as to make them take in common, instead of jointly or by the entirety, either part or all of the time.

Plaintiff's counsel, however, would go further and make out that in some way or other "either" has the effect of separating the estates transversely as between the first takers and the heirs of their bodies, and of not only giving the latter remainders by purchase but of creating cross-remainders between them. That certainly is imposing a considerable burden on that innocent word.

He strives to make out that the fact that the first takers take by the entirety makes a difference—reasoning that since that is so (that is, if the entirety is for the inheritance as well as for life), the heirs of the body of the survivor alone would inherit, but that the testatrix intended that the heirs of the body of each should take in any event, and hence that there is a change in the course of descent. But it is a contradiction of terms to assume, on the entirety theory, that the descent would be to the heirs of the body of the survivor alone, and that, on the intention theory, it would be to the heirs of the body of each, and then to assert that there is a change in the course of descent, for these two courses of descent could not both exist, either concurrently or successively. The course is either to the heirs of the body of one or to those of

each directly from the first takers, and that is all there is to it. What the course is from the first takers depends on how the first takers take—whether jointly or by the entirety or severally or part of the time jointly or by the entirety and the rest of the time severally.

Plaintiff's counsel has the cart before the horse. He also ascribes a causal relation between independent things. He first assumes that the estate is by the entirety and then tries to argue from that to ascertain whether it is for life or in fee, as if the former had anything to do with the latter. The usual course is to determine independently whether it is for life or in fee and then, whichever it is, the law makes it joint or entire or several according to whether the takers are husband and wife or not and whether there are words of severalty or not and whether the presumption favors a joint or entire tenancy, as at common law, or a several tenancy, as in many jurisdictions under statute or judicial decisions.

Plaintiff's argument goes too far and refutes itself by leading to absurdities. He argues that, because, the limitation is to the heirs of the body of either, the course of descent cannot be to the heirs of the body of the survivor alone. He assumes that the heirs of the body of each were intended to take in any event upon the death of the first takers, so that, for instance, if the only heirs of the body were those of only the first-dying first taker they would take the whole. This, of course, is a pure unfounded assumption. There is nothing in the will to support it. It is, moreover, an

assumption of the very thing to be proved, namely, that the heirs of the body are to take by purchase and in remainder. It overlooks the fact that "heirs of the body" are mere words of limitation indicating the *quantum* of the estate of the first takers.

If the argument is sound, then (and this is the absurdity to which it leads) whenever the limitation of "heirs" or "heirs of the body" relates to each of two or more first takers, the estate cannot be a fee (whether simple or tail), but must be a life estate and remainder. This may be illustrated in several ways. Let it be borne in mind that if the devisees are husband and wife, the heirs of the body are held to be the heirs of the joint bodies unless there is something additional to show that they are intended to be the heirs of the several bodies, and that the word "either" shows this in the present case, so that it makes this case like any other case where the heirs or heirs of the body are not necessarily the heirs of the joint bodies.

Let us first illustrate by the ordinary case of a devise to "A and B and their heirs" (general). Here "heirs" means the heirs of each. They are the heirs general (collateral as well as lineally descendant and ascendant) and those of A may be in whole or in part different from those of B, just as in the present case the "heirs of the body" of one first taker may be different in whole or in part from those of the other. The estate, however, would at common law, in the absence of controlling context, be joint if A and B were not husband and wife, and by the entirety if they were

husband and wife; and in jurisdictions in which the presumption is changed, the estate would, in the absence of controlling context, be several (in common). In any case it would be a fee simple in the first takers. And yet, if the plaintiff's argument were applied, it would have to be held that, since the "heirs" are those of each A and B, it was intended that they all should take in any event, as, for instance, if there were only heirs of the one dying first, they should take the whole; that therefore there must be contingent cross remainders between all the heirs, and hence that they must take by purchase, and therefore the first takers must have only a life estate!

Somewhat similarly, take the case of a devise to "A and B and the heirs of their bodies", when A and B are not and cannot become husband and wife. In such case, as held everywhere, "heirs of their bodies" means heirs of the bodies of each, just as in the present case, where the first takers are husband and wife, the word "either" makes the "heirs of the body" the heirs of the body of each, when but for "either" they would be heirs of the joint bodies. In such case, as will be shown below, since the severance affects only the inheritance, A and B would at common law hold jointly for life with several inheritances, that is, they would hold the fee tail in common subject to holding it jointly during life, and if the word "respectively" were added so as to affect the whole estate A and B would hold the whole fee severally. In any event the first takers would have the fee tail, whether they would hold it severally all the time or jointly part of the

time and severally the rest of the time. And yet, on plaintiff's argument, since the "heirs of the body" are those of each, there would have to be a life estate in the first takers and cross remainders in the heirs of the bodies!

(c) What, after all, does "either" mean? It might be contended that it had any one of the following four meanings:

First, it might be contended that "either" was used in its ordinary natural sense, so that "the heirs of the body of either" would mean "the heirs of the body of one or the heirs of the body of the other". But such a devise would be void for uncertainty, just as a devise to A or B would be void for the same reason. That would be different from a devise to A or his heirs, for both A and his heirs could not be in existence at the same time. (3 Wash., R. P., 6th ed., secs. 2115, 2118.) Hence, the remainder, if a remainder were intended, would, under this construction of "either", be void for uncertainty, and the only hope for the heirs of the body of either would be to hold that the first takers took an estate of inheritance.

Secondly, it might be contended that, strictly speaking, "either" excludes "both" as was held in *Martin* v. *Nahoa,* 4 Haw. 427, 429. If so, still more would the heirs of the "body of either" exclude heirs of the "bodies of both". Hence, since there were no heirs except of the bodies of both (joint), the remainder, if a remainder were intended, lapsed. The only hope, therefore, for the "heirs of the body of either", under this construction also would be to hold that the first

takers took an inheritance, for in such case such heirs would have a chance to get something by descent, or the first takers would be in a position to make provision for them.

Thirdly, it might be contended that "either" was used in the sense of whichever of the first takers survived; that is, as meaning the survivor. The plaintiff, indeed, has suggested that it was used in the same sense as in the bequest in the preceding part of the same paragraph, so as to make the devise as if it were to the first takers and the survivor of them and the heirs of the body of the survivor of them. This would make the survivor (not the heirs) take the inheritance, and, of course, is not what the plaintiff wants. There are also insuperable objections to it. That meaning is not natural. Also, the testator did not say survivor, although she knew well how to say it when she meant it, as shown in the preceding part of the same paragraph and elsewhere. Moreover, "either" in the preceding part of the paragraph, while it might result in the survivor, does not mean the survivor, but means one or the other, and is used to indicate length of time, while here it is used to indicate what persons are to take. Apparently, also, as the plaintiff herself contends, the testatrix did not intend to limit the descent to the heirs of the survivor as against the heirs of the one dying first, but intended merely to make no distinction between them and leave the law to take its course as to how the descent should go.

Fourthly, it might be contended that "either" means whether of one or the other, so that the devise would

in effect be to the first takers and the heirs of the body of each by whomsoever begotten. This, we think, is the sense in which the word was used. It means simply that there is no restriction on the heirs of the bodies. They are not limited to those of each by the other. The estate is a fee tail general and not special. It is in principle much like, but clearer than, a devise to A and B and the heirs *on* the body of A by B begotten, in which both A and B take a fee tail because "the heirs of the body" do not look or apply to one more than to the other. (See Elphinstone, Interpretation of Deeds, 235; *Denn* v. *Gillot,* 2 T. R. 431 [100 Eng. Reprint 232].)

Thus the word "either" not only does not help the plaintiff's case but it adds strength to the defendant's case. It is additional evidence that the first takers were to take an estate of inheritance. Indeed, it would be difficult, if not impossible, to give effect to a devise directly to the heirs of the body of either of two persons just as it would be impossible to give effect to a devise to either of two named persons. But when "heirs of the body of either" are construed as words of limitation and not of purchase, all difficulty disappears. The devise is to K and K, and the remaining words are used merely to indicate what estate they were to take. No such nicety or definiteness of expression is required in order to show that, as is required in a direct devise to the heirs of the body of either. And it is inconceivable that the testatrix would have used this means of showing that the heirs of the body were intended to take as remaindermen and

especially in view of the nicety of language used by her in the rest of the will and codicils and particularly when she created the remainders.

(d) Again, the important questions are, (1) who were to take, (2) what were they to take and (3) how were they to take?

(1) K and K were to take. (2) The word "heirs" shows that what they were to take was to be a fee of some kind. The words "of the body" show that the fee was to be of the fee tail class. The word "either" shows that the fee tail was to be of the fee tail general class. (3) If they were not husband and wife, they would at common law take in joint tenancy in the absence of anything to show that they were to take in severalty. If they were husband and wife, they would take in entirety, in the absence of anything to show that they were to take in joint tenancy or in severalty. If there was sufficient to show that they were to take in severalty, they would take in common, whether they were husband and wife or not.*

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*In Hawaii, although (contrary to the common law) a conveyance to two or more created, in the absense of controlling context, a tenancy in common as against a joint tenancy (*Awa* v. *Horner,* 543), it did not have this effect as against a tenancy by the entirety. (*Robinson* v. *Aheong,* 13 Haw. 196, and cases there cited.) In general, also, statutes which reverse the common law presumption as between joint tenancy and tenancy in common, are held not to affect tenancy by the entirety unless the latter are expressly mentioned, as is now the case in Hawaii. Rev. Laws, 1915, Sec. 3132. But that statute would not affect the devise in question because it was enacted (1903) long after the devise was made (1884), and besides it is

Almost any combination might be made by appropriate language. In any case, the particular arrangement and relationship of the words must be noted.

For instance, as to who would take the fee. It would be *those whose heirs are specified.* If the devise is to A and B and the heirs of their bodies, of course, A and B take the fee tail. If to A and B and the heirs of the body of A, A takes the fee tail and B only a life estate, or, what is the same, A and B take jointly for life and A takes the fee tail, or A takes a fee tail subject to holding jointly with B for life. (Co. Litt., sec. 285.) If to A and B and the heirs of the body of A by B, A takes the fee tail and B only a life estate. But if to A and B and the heirs *on* the body of A by B, A and B take the fee tail, for the heirs of the body do not look more to one than to the other. (Authorities cited above.) Similarly, if, as in the present case, to A and B and the heirs of the body of either, A and B take the fee tail, for the heirs of the body do not apply to one more than to the other. If to A

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expressly made non-retroactive. In general, also, married women's acts are held not to affect the creation, or the presumption in favor, of estates by the entirety, and in Hawaii the married women's act (1888) was not passed until after the devise in question was made (1884).

Joint tenancies and tenancies by the entirety are so similar that it is immaterial in this case whether the first takers would take by one or the other. Indeed, in the older cases tenancies by the entirety are often spoken of as joint tenancies and distinguished only by reference to their distinctive features, such as that entireties are not subject to partition and cannot be severed by the act of one of the parties alone, and that

and B and the survivor and the heirs of his (the survivor's) body, the survivor takes the fee tail, and A and B take only for life. (*Phelps* v. *Simmons,* 159 Mass. 415, 417; *Ewing's Heirs* v. *Savary,* 6 Ky. 235, 237; *Harmon* v. *Christopher,* 34 N. J. Eq. 452, 462; *Vicks* v. *Edwards,* 3 P. Wms. 373.) If to A and B and the survivor and the heirs of their (A's and B's) bodies, A and B take the fee tail, and the intervening estate in the survivor does not alter that. (*Stones* v. *Heurtly,* 1 Ves. Sen. 165, 167 [27 Eng. Rep. 95, 96]; *Young* v. *Southern,* 2 B. & Ad. 628 [108 Eng. Rep. 1276].) If to A and the heirs of the bodies of A and B, no one, but A takes for life and the heirs of the bodies in remainder. (*Frogmorton* v. *Wharrey,* 2 W. Bl. 728; *Gossage* v. *Taylor,* Stiles 325; 2 Jarman, Wills, 1186.) Plaintiff cites these two cases but fails to see the distinction on which they are based.

So, as to precisely what they would take. If the devise is to A and B and the heirs of their bodies (not meaning of their joint bodies, as where A and B are

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on the death of one his or her interest does not go to the other strictly by survivorship, but remains in the survivor, in whom, as well as in the decedent, the whole had been all the time, since both hold *per tout,* while in joint tenancy they hold *per my et per tout* and in tenancy in common they hold *per my.* Although plaintiff's counsel (brief, pp. 45-47) tries to base a distinction upon these differences between a joint tenancy and a tenancy by the entirety to serve his purposes, he is unable to do more than to enumerate the differences and then boldly assert that they make a difference in the result in this case, without showing how or why or citing any authority. And, of course, there is no reason. Persons may hold by the entirety as well as jointly all of the time (in fee simple or fee

two men or two women or a man and woman who can not marry because within the prohibited degrees, etc.) they take a fee tail general. If to A and B (husband and wife) and the heirs of their bodies, they take a fee tail special, for this means heirs of their joint bodies. If to A and B and the heirs male or female of their bodies, or the heirs of the body of each by the other, etc., they likewise take a fee tail special. If, as in the present case, to A and B and the heirs of the body of either, they take a fee tail general.

For numerous illustrations, see Elphinstone, Interpretation of Deeds, 235; 1 Shep. Touch., 112.

So, as to how they would take. (See, also, the opening statement of this brief.) There are three possibilities.

First, if the only office of "either" is to show that heirs of the body were not intended to be confined to the joint bodies, and therefore to show that the estate was to be a fee tail general instead of special, as we think is the case, the first takers would take the whole

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tail) or part of the time (for life) and severally the rest of the time.

Of course, also, estates in fee tail as well as in fee simple or for life may be held by the entirety. (1 Shep. Touch, 112; 1 Preston, Estates, 2d ed., 131.)

Moreover, husband and wife may take in severalty or in joint tenancy as well as by the entirety. It is simply a matter of intention. That they may take in severalty, see *Hunt* v. *Blackburn,* 128 U. S. 464, 469; *Carroll* v. *Reidy,* 5 App. D. C. 59; *McDermott* v. *French,* 15 N. J. Eq. 78; *Statcup* v. *Statcup,* 137 N. C. 305; *Fulper* v. *Fulper,* 54 N. J. Eq. 431; *Wilkins* v. *Young,* 144 Ind. 1, 5; *Brown* v. *Brown,* 133 Ind. 476; *Hicks* v. *Cochran,* 4 Edw. Ch. 107, 110; *Minor* v.

fee tail by the entirety, in which case, of course, the descent would be to the heirs of the body of the survivor alone, as in the case of any fee simple or fee tail estate held by the entirety or in joint tenancy. That is elementary. See, however, for instance, 1 Preston, Estates, 2d ed., 131-133. The heirs of the body would not have a remainder.

Secondly, if "either" had the further effect of the full force of a word of severalty, like "respectively", the result would depend on whether it affected the whole estate or only the inheritance. If, for instance, the word had the effect of making the devise as if it were to the first takers "and the heirs of their *respective bodies",* the word "respective" would seem to affect only the inheritance, in which case it would leave joint or entire the part for the lives of the first takers and merely cause the rest, that is, their inheritances, to be held in common. In such case, also, the heirs of the bodies would not take in remainder or by purchase. The inheritance would be in the first

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Brown, 133 N. Y. 308, 312; *Baker* v. *Stewert,* 40 Kans. 442, 445; *Wilson* v. *Frost,* 186 Mo. 311; *McDuff* v. *Beauchamp,* 50 Miss. 531, 535; *Marchant* v. *Cragg,* 31 Beav. 398, 401 (54 Eng. Rep. 1193); 1 Preston, Estates, 2d ed., 132; 1 Tiffany, Modern Law of R. P., sec. 165; Tiedemann, R. P., sec. 244; 2 Jones, Law of R. P. in Conveyancing, sec. 1792; 1 Washburn, R. P., 6th ed., sec. 914; 2 Cord, Rights of Mar. Women, sec. 1228; 4 Kent, Com., 133. The only jurisdiction in which it is now held that husband and wife cannot take in common is Pennsylvania. *Stuckey* v. *Keefe's Extrs.,* 26 Pa. St. 397, relied on by plaintiff. (Brief, p. 46.) But that case was based in part on propositions of law that cannot be sustained, and for this it

takers, and the heirs of the body would take, if at all, by descent, but since the first takers hold jointly for life, the heirs of the body of the first-dying first taker as well as the heirs of the body of the surviving first taker would not take their moiety until the death of the surviving first taker. In other words, the first takers would have the fee tail general in severalty subject to holding jointly for life; and the inheritance of the heirs of the body of the first-dying first taker would be in abeyance until the death of the other first taker.

Thirdly, if, however, "either" had a broader effect as a word of severalty, so as to affect the entire estate, as, for instance, if it had the effect of making the devise as if it were to the first takers and "the heirs of their bodies respectively", the result would be that the first takers would take the whole estate in severalty, so that immediately upon the death of the first-dying first taker, the heirs of his (or her) body would inherit their moiety and on the death of the other the heirs of

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has been severely criticised (see Freeman, Cot. & Part., sec. 72); it was based in part on the authority of *Dias* v. *Glover,* 1 Hoff. Ch. 71, decided by the Assistant Vice-Chancellor in 1839, and in ignorance of the fact that the contrary view had already been taken by the Vice-Chancellor in 1843 in the *Hicks* case, above cited, which latter view has ever since been followed in New York; it was based in part on the view that the question how husband and wife take is one of law and not of construction, although the latter is the correct view. (*Hiles* v. *Fisher,* 144 N. Y. 306, 312; *In re March,* 27 Ch. Div. 166.) And Pennsylvania stands alone as holding that husband and wife take by the entirety even when they take by descent. (*Gillan's*

her (or his) body would in turn inherit their moiety. In such case also the heirs of the body would not take by purchase or in remainder.

The law as set forth in the last two paragraphs is firmly established. It is well illustrated in *Ex parte Tanner,* 20 Beav. 374 (52 Eng. Rep. 647), per Sir John Romilly:

> "I am of the opinion that these words create a joint tenancy for life, with several inheritances in tail. It is not disputed that 'if lands be given to two men, and to the heirs of their two bodies begotten, in this case the donees have a joint estate for the term of their two lives, and yet they have several inheritances in tail'. (Littleton's Tenures, sec. 283.) But it is contended that in the present case the word 'respective' creates a ten-

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Extrs. v. *Dixon,* 65 Pa. St. 395, based in part on the *Stuckey* case, *supra.* See *contra, Brown* v. *City of Baraboo,* 90 Wis. 151; *Knapp* v. *Windsor,* 6 Cush. 156.)

The idea that husband and wife cannot take in severalty originated with a passage in Littleton, which, however, as pointed out in *Marchant* v. *Cragg, supra,* referred only to joint tenancy. Even if they could not hold in joint tenancy, it would be immaterial in this case, for neither party claims that they did so hold. Both parties agree that they were to hold by the entirety at least for life. The only question is whether they hold also by the entirety or in severalty as to the inheritance (and it is immaterial for the purposes of this case in which of these ways they hold the inheritance), or do not hold the inheritance at all. But, while there have been statements to the effect that husband and wife cannot take as joint tenants although they may take as tenants in common, on the ground that tenancy by the entirety is only a species or slightly modified form of joint tenancy, such statements seem to be confined mostly to the older writers, for adjudications are wanting or rare, and, so far as the cases

ancy in common in tail, and that the expression applies not only to the inheritance, but to the whole estate of the children. I think, however, that the word 'respective' expresses only that which the law would imply without it. If lands were given to a man and woman, and the heirs of their bodies, this would be an estate in special tail (Littleton's Tenures, seç. 16), and the word 'respective', if introduced before the word 'heirs', would have the effect of making the man and woman joint tenants for life [that is, with several inheritances]. It would be the same as if the gift were to a man and woman who could not marry, and the heirs of their bodies. So if an estate were devised to two and their heirs, they would be joint tenants in fee simple, and if not severed the survivor would take the whole; but if the words 'respective heirs' were introduced, and it were a devise to A and B, and to their respective heirs, I should be of the opinion that they were joint tenants for life, with several

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are concerned, appear to amount merely to this, that the intention must be manifested more clearly to make out a case of joint tenancy than to make out a case of tenancy in common as distinguished from a tenancy by the entirety, because in general words which at common law would create a joint tenancy in others would create a tenancy by the entirety in husband and wife. (See the *Wilson* and *McDuff* cases, *supra.*) The weight of modern opinion is that husband and wife may take in joint tenancy as well as in common, if the intention appears with sufficient clearness. (*Hoag* v. *Hoag,* 213 Mass. 50, 53; *Tornburg* v. *Wiggins,* 135 Ind. 178, 185; *Fladung* v. *Rose,* 58 Md. 13, 21-5; Carr, Collateral Ownership, 14, 17, and other authorities *supra.*)

There is nothing in Hawaiian law to prevent husband and wife from taking either in common or in joint tenancy as well as by the entirety, as held by the Supreme Court of Hawaii in this case, 23 Haw. 747. (Tr., p. 49.)

> inheritances in fee. I think I must give the same effect to these words as I should in the case suggested, and I must confine the application of the word 'respective' to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail.* Here [in the case under discussion] the expression 'respective' is limited to the inheritance, and these are fit words to create a joint estate for life, with several estates of inheritance in tail. I think it would be impossible to give any other construction to these words, if the question arose upon a deed, and there is nothing from which I can come to a different conclusion when they are used in a will. The children were, therefore, joint tenants for the term of their lives, with several inheritances in tail."

See also *Doe* v. *Green,* 4 M. & W. 229 (150 Eng. Rep. 1414); *Forrest* v. *Whitway,* 3 Exch. Rep. 366; Co. Litt., secs. 283, 284; (1 Thomas' Coke on Litt., 182b, 183a, 183b); 2 Preston, Estates, 2d ed., 425, 437; Bacon's Abridgement, Tit. Joint Tenants, G; Viner's Abridgement, Tit. Jointenants, L. 36 (492); 2 Jarman, Wills, 252; 2 Underhill, Wills, sec. 536. This was recognized by the Supreme Court of Hawaii in this case, 23 Haw. 747. (Tr., p. 49.)

All the sophistry of plaintiff's counsel (see his brief, pp. 22-25, 50-51) cannot alter this. His attempted sophistry, however, even if it were sound, would not help his case. In substance it amounts to selecting the methods of stating the result which he seems to think are the least unfavorable to him, the aim being obviously to camouflage the real result with the false

color of a life estate in the first takers and a remainder in the heirs of their bodies. For instance, referring to the result which we have stated under "Secondly" above, he says that the first takers would be "joint tenants for life, with several inheritances in tail", or that they would take "an estate for their joint lives and the life of the survivor, that is, as joint tenants with remainder to each of them as tenants in common in fee after the death of the surviving life". These are only two of a number of modes of expressing the same result. Another mode (see Preston, *ubi supra*) is to say that the first takers "will severally be tenants of their respective moieties in general tail, and they will be joint tenants of the freehold", that is, for life, or, as the Court said in *Doe* v. *Green, ubi supra,* "They took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor."

The important thing is that, in whatever way the result is stated, the heirs of the body do not take by purchase or in remainder. The first takers take the fee, but have it for a time (during life) jointly and the rest of the time severally, and the heirs of the body take, if at all (that is, if the first takers do not dispose of it), only by descent. There is no possibility of making "either" do service in the way of breaking the estate crosswise at the death of the survivor so as to divide it into only a life estate in the first takers and a remainder (cross-remainders) in the heirs of their bodies.

Plaintiff's brief, indeed, teems with errors. On page 55, for instance, we read, "without the words

'of either' this devise would undoubtedly give an estate tail general to the survivor, which result curiously enough is attributed by the Court to the addition of the words 'of either' ". There are at least two errors in this statement: (1) The devise would not give any estate to the survivor. It would give an estate tail to both first takers, and the survivor would hold after the death of the other by operation of law; (2) Without the words "of either" the first takers would take an estate tail special and not an estate tail general. See, for example, *Ex parte Tanner, supra.*

(e) Apparently plaintiff's counsel has deemed it excusable to attempt to engraft on "either" some strange unnatural function because he has been unable to find any case in which that word occurs in just this way. The principles involved, however, are so well settled and so easy of application, not to mention the natural meaning of the words used, that it would be entirely immaterial whether any precisely similar case in all details could be found or not.

In *Huntley's* case, however, the word "either" is used just as it is here. That case is reported in three places and all three of the reports throw light on the question. (3 Dyer, 326a [73 Eng. Rep. 736]; Benloe, 226 [123 Eng. Rep. 159]; 1 Anderson, 21 [123 Eng. Rep. 332].)

Robert Huntley devised the land to his wife for life and then to Lucy Roper and Nicholas Griston, who were brother and sister, children of Matthew Griston, and to the heirs of either of their two bodies. The report in Benloe is partly in Latin and partly in

English. It says, in Latin, that the devise was in the English language and in these exact words:

> "Item, I will, give and bequeath unto the said Jane my wife, and her assigns" certain lands, describing them, "To have and to hold all and singular the said freehold lands, messuages and tenements, with the appurtenances, unto the said Jane my wife and her assigns, during her life natural, and after her decease I will and bequeath all that my said messuage or tenement," describing one of those already mentioned, *"unto Luce Roper and Nicholas Griston, and to the heirs of either of their two bodies lawfully begotten,* I will that the said messuage or tenement shall remain to the right heirs of me the said Robert Huntley for evermore."

It will be noted not only that "either" is used just as it is in the present case, but also that the words "and to" were used, which plaintiff's counsel in the present case has the boldness to say are words of futurity and separation. (See p. 41 above.) Also the devise is *"unto",* which plaintiff's counsel in his brief (pp. 48, 75) seems to think important. Moreover, there is a comma between the words indicating the first takers and those indicating the heirs of the bodies, as there is not in the present case. Furthermore, since the devisees were brother and sister and therefore could not marry, the inheritance would be several although otherwise the devisees would take jointly, and thus "either" would have less of a function to perform in going the rest of the way and creating cross-remainders in the heirs of the body or making them take by purchase. It was likewise a case of an estate tail. Further-

more, there was a gift over of a remainder, which was regarded as intended to be upon default of issue of the devisees (*"pur default de tiel* issue", as Anderson puts it, or "for default of such issues of the bodies", as Dyer puts it).

And yet the Court held in effect (1) that the first takers took a fee tail, (2) that the heirs of the body took only by descent and not in remainder or as purchasers, (3) that there were no cross-remainders, (4) but that, although the first takers took jointly, they did so only for life and took the inheritances in severalty, not because of "either" but because, being brother and sister, the devisees could not have heirs of their joint bodies. Even that effect was ascribed to a different cause than the use of the word "either" and much less did that word have the effect of converting the fee tail of the first takers into a life estate in them and a fee simple in the heirs of their bodies.

The facts were, that Nicholas died without issue and afterwards Lucy died leaving issue, a son, William Roper, who also later died. The action was brought by Humphrey Huntley, heir of the testator, against John Roper, administrator of William Roper, for half of the rent under a lease made by the testator and later assigned by the lessee to William Roper. The question was, whether, upon the death of both Lucy and Nicholas, the whole land went to Lucy's son or half went to him and the other half (Nicholas') went under the remainder over (or reversion) to the heir of the testator inasmuch as Nicholas left no issue.

If the argument of plaintiff's counsel in the present case were sound, the Court should have held that the heirs of the bodies of the first takers were to take in any event so that upon the death of both first takers the whole land should go to the issue of the one of the first takers (Lucy) who alone left issue. The Court, however, held that Lucy and Nicholas took jointly for life with several inheritances, and hence that Lucy's half would descend (not go by purchase as a remainder) to her issue and that Nicholas' half would go to his issue, if he had any, but, that, since he had none, it would go over to the heirs of the testator, but that since Nicholas died first and the estate was joint for life, the inheritance of the heir of the testator was in abeyance until Lucy's death, and that therefore he could recover his half of the rent only from the time of Lucy's death.

The report of the case in Dyer is in English, but purports to give only the substance, not the exact language of the devise, as follows:

> "To a woman and her brother, and to the heirs of every of their bodies lawfully begotten; and for default of such issue of the bodies," remainder to, etc.

The report in Anderson is in French and likewise purports to give only the substance of the devise as follows: "a les heirs de chescun (modern chaque) de lour corps loyalment engendres pur default di tiel issue que le di messuage remane a les droit heirs le devisor".

This is a leading case and is often cited with ap-

proval. The following, with a marginal reference to this case, is found in 2 Shep. Touch. 445-6:

> "If one devise land to I. S. and I. D. and the heirs of either of their bodies lawfully engendered; it seems that by this devise I. S. and I. D. shall take and hold as tenants in common and not as joint tenants. And so if one devise his land to I. S. and I. D. thus, I will that I. S. and I. D. shall have my lands in *Dale,* and occupy them indifferently to them and their heirs" (meaning, of course, subject to holding jointly for life), and in the note it is further said that if the devisees may intermarry "they take a joint estate tail".

2. *The gift over "upon default of issue" not only does not militate against but substantially supports the theory of an estate tail.*

(a) Default of issue is merely an event upon the happening of which one devise, that to the first takers in fee tail, is to determine and an alternative devise, that to the trustees, is to take its place or begin. The gift over "upon default of issue" follows and does not control the prior devise. Indeed, the gift over might have been conditioned at the pleasure of the testatrix upon the default of the issue of either one of the first takers or of the survivor of them or of any other person and irrespective of whether the descent under the prior devise was to be to the heirs of the body of both or of each or the survivor. Of course, if the testatrix had specified precisely upon the default of what issue the gift over was to take effect, that might throw some light on the question whether the descent in the prior devise was intended to be to the

issue of both or of each or of the survivor of the first takers. But, as it is, the devise over is to take effect "upon default of issue," without specifying what issue, and hence we are thrown back to the prior devise to ascertain what issue.

(b) Plaintiff's counsel assumes that the devise over is to take effect upon default of all the issue of each of the first takers. From this he infers that if one first taker leaves issue and the other does not, then, since the devise over cannot take effect (on his assumption), the moiety left by the first taker who leaves no issue must go somewhere else, and since, as he assumes, there is nowhere else for it to go, it must go to the issue of the other first taker. Hence, he concludes, there must be cross remainders between the issue of the respective takers, in which case the issue would take by purchase.

His assumptions, however, are without foundation. Not only is it not true that the gift over could take effect only upon default of all issue of both first takers, but even if that were so, it is not true that the moiety of the one dying without issue would have to go to the issue of the other.

Take the first assumption. The established rule is, in the case of a gift over merely upon default of issue, not that the gift over is to take effect only upon the default of all issue of the first takers, but that it is to take effect upon default of such issue of the first takers as would take from the first takers *and only to the extent* that such issue would take. In other words, the gift over follows the prior gift. Hence, if the first

takers would take a fee tail by the entirety, so that the descent would be to the heirs of the survivor alone, the gift over would take effect upon default of the issue of the survivor alone. If the first takers would take the fee tail severally, the gift over would take effect as to one moiety upon the death of one first taker without issue, and as to the other moiety upon the death of the other first taker without issue. If the first takers would take by the entirety for life with several inheritances, the gift over would take effect only upon the death of the surviving first taker and as to one moiety or the other or each according as one or both of the first takers died without leaving issue. It is the same in the case of a remainder over as in the case of a reversion over.

This is illustrated in *Huntley's* case above.

Coke (1 Thomas' Coke on Litt. 183 b; see also 183 a), after explaining holdings for life jointly with several inheritances, says:

> "Here the cause of the entry of the donor into a moiety in the case is, that, in as much as the inheritance is several. Therefore, upon the several determination of the estate in tail, the donor may enter."

Bacon (Abridgment, Tit. Joint-Tenants, G.), after describing many kinds of estates tail, especially those held jointly for life with several inheritances, says:

> "And in all the cases above-mentioned where the inheritances are several, the reversion depending thereon is several also; and if any of the donees die without issue, the donor shall, after

the death of all the donees, enter into a moiety, or a third part, etc."

The principle is illustrated in a case (*Irvin* v. *Stover,* 67 W. Va. 356, 363-4 (67 S. E. 1119) cited by the plaintiff. The devise was to husband and wife "and after them to their heirs." Of course, as there were words of separation and the rule in *Shelley's Case* did not obtain in that state, there was a life estate and remainder. But the point is that although the court held that the first takers took only a life estate and that, too, by the entirety and that the heirs took by remainder, it held that only one moiety would go to the heirs of one and the other moiety to the heirs of the other and that there were no cross remainders between.

(c) Now, as to the other assumption, that, if the gift over would take effect only upon default of the issue of both first takers, the result would be cross remainders between the issue of the first takers. That would not be so. The result, if it were clearly stated that the gift over was conditioned upon the failure of issue of both first takers (which is not the case here) would be cross remainders or survivorship between the two first takers themselves and not between their issue. This, of course, would not help the plaintiff, for the first takers alone would take an estate of inheritance and the heirs of their bodies would take, if at all, only by descent.

This is illustrated in an unentitled case in 3 Dyer 303 f-304a (49-50) (73 Eng. Rep. 682). The testator devised the third part of his lands to his oldest

son and the other two parts "to his four younger sons by name, and to the heirs male of their bodies begotten, and if the *infant in ventre sa feme* should be a son, then him to have his fifth part as coheir with his four youngest brothers; and if they all five should happen to die without issue male of their bodies, or any of their bodies lawfully begotten; then he willed that the said two parts should revert, remain, and come to the next heirs of the devisor forever." The sixth son was born after the death of the father and he and three of the other younger sons afterwards died without issue. Here was a clear case where the reversion or remainder was not to take effect except upon a failure of issue of each and all of the first takers. According to plaintiff's counsel, the issue of the surviving younger brother should take the interests of the four deceased younger brothers, by way of cross remainders. The court, however, held otherwise. The court appeared to consider that, as of course was the case, the only possible alternatives were whether the younger brothers took in severalty or with the right of survivorship and it held the latter; in other words, that the surviving younger brother took the whole two-thirds in tail. If the gift over had not been expressly conditioned upon default of the issue of all, the younger brothers would of course have taken jointly for life with several inheritances, and upon the death of one without issue the remainder or reversion would have taken effect as to that one's share alone, but since the gift over was not to take effect except upon default of issue of all, upon the death of one or more

without issue his or their share or shares went by survivorship or cross remainder by implication to the others or other. There was no possibility of his or their share or shares going by way of remainder to the issue of the other or others. (See also *Wright* v. *Holford,* 1 Cowp. 31 (98 Eng. Rep. 951); *Phipard* v. *Mansfield,* 2 Cowp. 787 (98 Eng. Rep. 1367), affirmed in 1 Dow. 384; *Atherton* v. *Pye,* 4 T. R. 710 (100 Eng. Rep. 1259).

(d) What, after all, really is the effect of the words "upon default of issue"? These words, besides indicating the event upon which the devise over is to take the place of the prior devise, may affect either the prior devise or the devise over, the nature of the effect depending upon whether the failure of issue is definite or indefinite. But it is unnecessary to decide in this case what the effect is or whether the failure is definite or indefinite, for, whatever the nature of the effect or the failure, it does not in the least favor the plaintiff's contention, but either favors the defendant's contention or is neutral as to both contentions. The effect may be (a) to enlarge or cut down the prior devise to an estate tail or (b) to determine whether the devise over is a remainder or an executory devise or void.

First, as to the prior devise. Assume that the failure of issue is indefinite. Then, if the prior devise were to the first takers indefinitely, which standing alone would be a life estate at common law, it would be enlarged to a fee tail by the devise over upon default of issue. Or, if the prior devise were to the first

takers and their heirs, which standing alone would be a fee simple, it would be cut down to a fee tail by the devise over upon default of issue. Or, if, as in the present case, the prior devise were to the first takers and the heirs of their bodies, which would be an estate tail, its nature as an estate tail would merely be emphasized by the devise over upon default of issue. All of which favors the defendant's contention for an estate tail.

Assume, on the other hand, that the failure of issue is definite. Then, if the prior devise standing alone would be a fee simple or a fee simple conditional or a fee tail, the devise over upon default of issue would merely make it defeasible. If the definite default did not happen, the prior devise would remain unaffected; if it did happen the prior devise would determine and the alternate devise over would take its place. The prior devise would not be changed to a life estate and remainder. And if the prior devise were a life estate and remainder, it would likewise remain unaffected, except that if the definite default occurred the prior remainder would drop out and the alternative remainder over would take its place. None of which favors either contention.

Secondly, as to the devise over. Assume that the default of issue is indefinite. Then, if the prior devise were a fee tail, the devise over would be a remainder, because a remainder can be limited after a fee tail. If the prior devise were a fee simple, the devise over would be void, because it would be too remote.

Assume, however, that the default of issue is definite: Then, whether the prior devise were a fee simple or a fee simple conditional or a fee tail, the devise over would be an executory devise, taking effect, as already stated, by the way of defeasance of the prior devise upon the happening of the event. And similarly, as already stated, if the prior devise were a life estate and remainder, the remainder would drop out upon the happening of the event and the devise over would take effect as an alternate remainder. None of which favors either contention.

All this is familiar law set forth in numerous text books and cases (see, for instance, 1 Tiffany, Modern Law of R. P., pp. 62-4, 329; Underhill on Wills, sec. 650; 40 Cyc. 1591-2, 1599-1601) and is recognized in Hawaii. *Hemen* v. *Kamakaia,* 10 Haw. 547, 554; *Ninia* v. *Wilder,* 12 Haw. 104, 110; *Rooke* v. *Queen's Hospital,* 12 Haw. 375, 382, 392. As examples of such defeasible fees with executory devises over, see *Hemen* v. *Kamakaia,* 10 Haw. 547, 554, and *Ninia* v. *Wilder,* 12 Haw. 104, 110 (fees simple); *Rowland* v. *Warren,* 10 Or. 129, 132 (fee simple conditional); *Linn* v. *Alexander,* 59 Pa. St. 43, 46, and *Pearsol* v. *Maxwell,* 68 Fed. 513, 515 (fees tail).

(e) Plaintiff's counsel cites (Brief, p. 78) *Paiko* v. *Boeynaems,* 22 Haw. 233, 240, and other Hawaiian cases, which hold that, while a devise to A indefinitely (without words of limitation such as "and his heirs") might be either for life or in fee, with the presumption in favor of a fee, the fact that there is a devise over upon A's death shows that the devise to

him was intended to be for his life. We cannot see what bearing those cases have on a case like the present in which there are words of limitation in the first devise and in which the devise over is not absolute on the first taker's death but only upon default of issue.

(f) Plaintiff's counsel also assumes that "upon default of issue" means a definite default. We contend that it is immaterial for the purposes of this case whether it means a definite or an indefinite default, but, of course, if it does mean, as we contend it does, an indefinite default, this alone, is fatal to the plaintiff's case.

By a rule of construction at common law words naturally indicative of an intent to provide for a gift over upon the death of the first taker without leaving immediate issue of his body—but if he did leave issue then the condition to be forever wiped out—were considered to contemplate an indefinite failure of issue.

To give this construction was, of course, a miscarriage of the intent of the testator, and just as the courts of Hawaii refused to accept the rule in *Shelley's Case,* so they refused to accept this rule of construction. But just as the repudiation of the rule in *Shelley's Case* does not mean that the testator's intent to use words as words of limitation will not be given effect, so the repudiation of this rule does not mean that the court will discard the express intention of the testator and hold that words clearly indicative of an indefinite default of issue shall be construed as words indicating a definite default.

Issue presumptively means heirs of the body or

issue of every degree, irrespective of any formal rule of construction. 2 Jarman on Wills, 5th Ed., 411; 40 Cyc. 1456.

The cases relied on by the plaintiff to show that a definite default is intended are cases involving such expressions as "die without a child," "die without issue," or "die without leaving issue," etc. *Hemen* v. *Kamakaia,* 10 Haw. 547, 554-8; *Rooke* v. *Queen's Hospital,* 12 Haw. 375, 399. Such expressions differ from "upon default of issue," "on failure of issue," etc., in that they refer to the death of the first taker, and the words relating to issue are so connected with the words relating to such death as to make them referable to the time of such death or to confine them to the immediate issue of the first taker, while such words as "upon default of issue" do not refer to the death of any person or class of persons at all, but, on the contrary, naturally signify a giving out or general failure of issue. The difference between the two classes of expression was recognized in the *Rooke* case, just referred to, on page 399.

Of course, even these more general expressions might be coupled or connected with death; as, upon default or failure of issue "at the death" of the prior takers. But such is not the case here.

The distinction just pointed out is referred to by Hawkins on Wills, page 216, where in consequence of this distinction he doubts whether the English Wills Act of 1837, which changed the legal presumption that expressions such as "die without leaving issue" imported an indefinite failure, applied to such expres-

sions as "upon default of issue"; because the act was designed to break down construction subversive of intent and not to lay down a rule of construction which would itself disregard expressions of intent to provide for an indefinite failure.

But not only does the expression "upon default of issue" fail to support the construction contended for by the plaintiff; it really gives finality to the normal construction of the devise to the first takers and "the heirs of the body of either" as a devise in fee tail because of the nicety of its consistency with such a devise—a consistency which obtains in no other construction. To spell out the construction which the plaintiff would have given to the devise, viz.: "to the first takers and the survivor of them for life, remainder in fee to the heirs of the body of each, upon default of issue the same to go to my trustees," etc., it is obvious that an ambiguity confronts us at once. We are unable to tell whether the trustees are to take only if the first takers die without issue, or whether the default refers to the issue of the remaindermen. If the intent was, as claimed by the plaintiff, to give alternative remainders to the heirs of the body and to the trustees, it is not only difficult to comprehend why, in a will as carefully drawn as is this one, the provisions in remainder were not placed in contiguity and worded in the alternative, but why the words "default of issue" were used rather than "but if there are no heirs of the body of the first takers." For to give an exact meaning to "upon default" requires that there has been some limitation upon default of which the

devise to the trustees is to come in. No only, however, would the language be ambiguous as to whether the devise over is upon the death without issue of the first takers or upon the death without issue of the remaindermen, but in so far as there is anything tending to relieve this ambiguity it would point toward a devise over upon death of issue of the remaindermen. If we assume that the devise over is upon default of issue of the remaindermen, who, according to plaintiff, are to take in fee simple, the intention of the testatrix is again clouded with doubt. Did the testatrix contemplate a definite or an indefinite default of issue?

On the other hand, by accepting the normal construction of "to the first takers and the heirs of the body of either," the devise not only loses all ambiguity but takes on that nice consistency of expression which marks the entire will. For the most proper way in which to denote a reversion or remainder after an estate in fee tail was to condition the same "upon default of issue" of the tenant or tenants in tail. There could be, therefore, no question of ambiguity arising in the use of this expression in connection with the devise of the estate tail.

How closely interwoven are the devise of an estate tail and the provision for a remainder upon the termination of that estate limited by words expressive of a default of issue is indicated by the Wills Act (1 Victoria, chap. 23, sec. 29), which provides "that in any devise or bequest of real or personal estate the words 'die without issue' or 'died without leaving

issue' or 'have no issue' or any other word which may import either a want or failure of issue of any person in his life time or at the time of his death or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the life time or at the time of the death of such person, and not an indefinite failure of his issue; *unless a contrary intention shall appear by the will by reason of such person having a prior estate tail,* or of the preceding gift being without any implication arising from such words of limitation of an estate tail to such person or issue or otherwise."

It requires no partisan effort to maintain that the use of an expression to carry a limitation over so perfectly in accord with the creation of an estate tail, and unambiguous only in case the previous language is given its normal construction of an attempt to create an estate tail, strongly indicates that the intent of the testatrix was to devise an estate tail to the first takers.

Moreover, the testatrix' general scheme favors an indefinite failure and hence an estate tail. She gave the residue, constituting the bulk of her estate, to trustees for the founding and maintenance of certain schools. Will, Item 13. And, as we have seen, she gave remainders to the trustees in all the many instances in which she gave life estates to others. She left no near relatives and made no provision for those who would be her heirs at law, except that she gave a life interest in certain lands and an absolute interest in certain personal property to her husband. Will,

Items 9, 16. And, even if, on the plaintiff's theory, the heirs of the bodies of the first takers would take by purchase, their estate would be a fee tail and not a fee simple. 2 Jarman, Wills, 62. Hence the estate would be a fee tail, whether in the first takers, on the defendant's theory, or in the heirs of their bodies, on the plaintiff's theory, and there might be an extinction of issue in either case at any time. The most probable and natural thing, therefore, for the testatrix to do would be to make the gift over to the trustees take effect whenever the heirs of the body ran out. As between a reversion to her heirs general, whoever they might be at some future time upon the extinction of issue, and a gift over to the trustees, she obviously preferred the latter. She can hardly be supposed to have intended that if the heirs of the body should be extinct at the death of the first takers the property should go to the trustees, but that if they should become extinct at a later date it should go to her heirs general.

IV.

A DEVISE WHICH WOULD BE A FEE TAIL IN ANY PARTICULAR JURISDICTION, IF A FEE TAIL COULD EXIST THERE, WOULD, IF A FEE TAIL COULD NOT EXIST THERE, BE A FEE SIMPLE CONDITIONAL OR, IF A FEE SIMPLE CONDITIONAL ALSO COULD NOT EXIST THERE, IT WOULD BE A FEE SIMPLE.

1. *This is the rule in all other jurisdictions and*

subject to a qualification not material to the present case, is held to be the rule in Hawaii.

The question in each instance is whether the estate would be a fee tail, not at common law, but in the jurisdiction in question, if a fee tail could exist there. If it would be, it logically follows that the estate would be a fee simple conditional or a fee simple, if a fee tail could not exist in that jurisdiction. The cases will be referred to later.

In the case of a direct, express, intentional fee tail (as, to A and the heirs of his body), the question whether the estate would be a fee tail in the particular jurisdiction, if a fee tail could exist there, would be the same as the question whether it would be a fee tail at common law.

If, however, the estate would be a fee tail, if at all, only by the operation of the rule in *Shelley's Case* (as, to A for life and after his death to the heirs of his body), then if the rule in *Shelley's Case* obtained in the particular jurisdiction the question would be the same there as at common law. But, if in the particular jurisdiction the rule in *Shelley's Case* did not obtain the estate would not be a fee tail there, but would be a life estate and remainder, even if a fee tail could exist there, although it would be a fee tail at common law.

Similarly, if the estate would be a fee tail, if at all, only by implication (as, by being enlarged from an indefinite devise or cut down from a fee simple by a gift over upon an indefinite failure of issue), the words (such as "die without leaving issue") which at com-

mon law were held to import an indefinite failure of issue might in the particular jurisdiction be held by the courts or declared by statute to import a definite failure of issue. If therefore in the particular jurisdiction the words would be held to import an indefinite failure of issue, the question whether the estate would be a fee tail, if a fee tail could exist there, would be the same as at common law. But if in the particular jurisdiction the words were held to import a definite failure of issue, they would not enlarge or cut down the estate to a fee tail, even if a fee tail could exist there, but the estate would remain, either a life estate or a fee simple as the case might be.

The courts elsewhere than in Hawaii proceed thus logically in every case. They first ascertain whether the estate would be a fee tail there, if a fee tail could exist there, and then, if they so hold, they further hold that it would be a fee simple or a fee simple conditional, as the case might be, if a fee tail could not exist there.

This would seem to be inevitable even when the result would clearly be contrary to the intention of the testator, as, when the estate would be a fee tail, if at all, only by the rule in *Shelley's Case.* This may be made clearer by reversing the process of reasoning. Ordinarily the process is this: The devise, although in terms a life estate and remainder, would be a fee tail by the rule in *Shelley's Case,* if a fee tail could exist in the particular jurisdiction; hence, since such an estate cannot exist there, it must be a fee simple. Now reverse this as follows: Since a fee tail cannot

exist there, we will not first assume that it can exist there for the purpose of determining whether it would be a fee tail, if a fee tail could exist there, but will assume at the outset that it is a life estate in the first taker and a remainder in fee smple in the second taker, aside from the rule in *Shelley's Case*. Then, however, since the rule in *Shelley's Case* obtains there, such life estate in the first taker and remainder in fee simple in the second taker are united into a fee simple in the first taker. Thus the same conclusion is reached by each process. The unfortunate conclusion in such case is the result, not of the logic of holding that what would be a fee tail, if a fee tail could exist, would be a fee simple, if a fee tail could not exist, but of adhering to an archaic rule, namely, that in *Shelley's Case,* which in most instances thwarts the intention. The logic of the reasoning might be illustrated similarly in the case of what would be a fee tail, if at all, only by implication.

It is hardly necessary to add that the rule in *Shelley's Case* has no application to an express fee tail like the present. The difference between the abolition of that rule and the abolition of estates tail is well brought out in *Duffy* v. *Jarvis,* 87 Fed. 731, 734. (See, also, *Rooke* v. *Queen's Hospital,* 12 Haw. 375, 390; *Robinson* v. *Aheong,* 13 Haw. 196, 199; *Thurston* v. *Allen,* 8 Haw. 392, 401.) It is equally apparent that the subject of the creation of fees tail by implication is not involved in a case like the present, where the estate is an express fee tail. It may be added also that in Hawaii the courts have not ad-

hered either to the rule in *Shelley's Case* or to the rule which requires that certain words which naturally import a definite failure of issue shall be held to import an indefinite failure. Hence, in Hawaii the logical rule should in all or nearly all cases that would be likely to arise coincide with the actual intention of the testator. In Hawaii also fees simple conditional as well as fees tail cannot exist, and hence the question is solely whether an estate which would be a fee tail, if a fee tail could exist, is a fee simple or a life estate and remainder.

In Hawaii, however, the Court has taken the position that it need not proceed in all cases strictly logically, as is done in all other jurisdictions in which the question has arisen, but that, even if the estate would be a fee tail in Hawaii, if a fee tail could exist there, it might, nevertheless, be held to be a life estate and remainder, if there is sufficient in the will or deed to show that that result would be more nearly in accord with the real intention of the grantor or testator; in other words, that there might be sufficient in a deed or will to show that, although the estate would be a fee tail, if a fee tail could exist, it should nevertheless be held to be a life estate and remainder, if a fee tail could not exist.

Conceivably such might be the case, as, for instance, if the grantor or testator after creating what would be an estate tail, if an estate tail could exist, should add in so many words that if it should be held that an estate tail could not exist he desired that the devise should be held to be a life estate and remainder; and

it may be that sufficient words could be used short of such a direct declaration to overcome the otherwise normal or logical result.

But, while the conclusion reached in *Nahaolelua* v. *Heen,* 20 Haw. 372, and *Boeynaems* v. *Ahleong,* 21 Haw. 699, which construed the same deed and merely followed the *Nahaolelua* case without further discussion, was doubtless gratifying under the special facts of that case and more conformable with the real desires of the grantor than the opposite conclusion would be, and perhaps could have been reached logically, it is not clear how the court could reach that conclusion logically after finding that the estate would be a fee tail, if a fee tail could exist in Hawaii. Aside from the question whether the court should not in those cases have given effect to the trust attempted to be created, it would seem that in order to be logical the court should either have held that, taking the deed as a whole and in view of all the circumstances, the estate created by it would not be a fee tail, even if a fee tail could exist in Hawaii, or else that, holding as it did that the estate would be a fee tail, if a fee tail could exist there, it was a fee simple, since a fee tail could not exist there. In other words, it should have decided the case by logic and not by conjecture, and in this the attorney for the plaintiff appears to agree with us. (See his brief, pp. 85, 86.)

The decision in the *Nahaolelua* case, which alone purports to give the reasoning for the conclusion, is meager and unsatisfactory even as far as it goes. This may be due to the extremely inadequate way

in which the case was presented to the court, if we may judge from the briefs on file in that case.

However that may be, the court did decide that if the estate would be a fee tail in Hawaii, in case such an estate could exist there, it would, since such an estate cannot exist there, be either a life estate and remainder or a fee simple "according to which appears to most nearly carry out the intention of the testator", and that this intention is to be determined "by the established rules of construction." All that it can be taken to have held is that in that particular case the special facts were such as to justify or call for a conclusion that the estate should be held to be a life estate and remainder. It did not go further and attempt to state what the normal rule would be, to be overcome or not according to the special facts of the case, or to state under what circumstances the estate should be held to be a life estate and remainder or a fee simple. The reiterated statement of plaintiff's attorney (see his brief, pages 80, 82, 85-87), that the court in effect held that if it appeared that a fee simple was not intended (which is necessarily the case when a fee tail is intended, and it is equally true that in such case a life estate and remainder is not intended) the estate must be a life estate and remainder, is absolutely without foundation. In the present case, however, the court, after full consideration of the matter, announced (23 Haw. 747, 760; Tr., pp. 56-7) in substance as the normal rule that the estate would be a fee simple and that it would require controlling context to take the case out

of that rule and make the estate a life estate and remainder.

Thus, the normal rule in Hawaii is the same as elsewhere, and the qualification added to that rule in Hawaii cannot affect the present case, inasmuch as, even if the *Nahaolelua* and *Boeynaems* cases were correctly decided under the qualification of that rule, they are easily distinguishable from the present case, because in those cases the provisions of the deed were about as potent short of a direct declaration as provisions of that kind could be in the direction of a life estate, and because in the present case not only is there absolutely nothing pointing in the direction of a life estate, but on the contrary the provisions of the will and codicils taken as a whole, so far from overcoming the normal rule or detracting from the force of its application, add tremendously to the strength of its application, so much so that, even if the normal rule were the other way, there is enough in the will and codicils to overcome it.

2. *The reasons for this rule are overwhelmingly conclusive.*

Take the case of an estate tail by implication cut down from a fee simple by a gift over on an indefinite failure of issue; as, to A and his heirs, with a gift over. How possibly could this, in the absence of other controlling context, be converted into a life estate and remainder? It is in terms a fee simple. The gift over, however, shows an intention to qualify or limit the heirs to the lineal heirs or heirs of the body. It is

much the same as if the testator had said, "I devise the property to A and his heirs, but I direct that there shall be no descent to collateral heirs." Where estates tail cannot exist, it would be an attempt at an unlawful restraint on inheritance and would be inoperative, leaving the estate a fee simple, just as would be the case if the attempt had been to impose an unlawful restraint on alienation. See *Simerson* v. *Simerson,* 20 Haw. 57, cited with approval in the *Nahaolelua* case, 20 Haw. 372, 377.

Likewise, take the case of a direct, express fee tail; as, to A and the heirs of his body, as in the present case. Here, also, is the plain case of an estate of inheritance—what, indeed, would be a fee simple but for the added words "of his body" designed to restrain the course of descent to a particular class of heirs and prevent a descent to other classes. But since, in Hawaii, such a restriction cannot be made, the restrictive words cannot be given effect and must be held inoperative, just as an attempted restraint on alienation of a fee simple by deed or will would be ineffective, and the estate must necessarily be a fee simple.

Again, only three courses are open. In a devise to "A and the heirs of his body," in a jurisdiction in which fees tail are not allowed, either the unlawful part alone of the attempted restraint, that is, the words "of his body" might be held nugatory, which is the natural and logical course, thus leaving the devise to "A and his heirs"—a fee simple; or, the whole phrase "heirs of his body," might be held nugatory, the

words "heirs" being regarded as tainted to that extent by the words "of the body," thus leaving the devise simply to A, which would be held to give A a fee simple in Hawaii, where such a devise without the word "heirs" is held to be a fee simple in the absence of controlling context (*Keanu* v. *Kaohi,* 14 Haw. 142), and even if it should be held to give A only a life estate it would nevertheless not give the heirs of his body any estate; or, the whole devise to "A and the heirs of his body" might be held nugatory or void on the theory that all these words went to make up the intended fee tail and that, since the fee tail could not exist, the whole devise fell, in which case not only would the devise be defeated as to the plaintiff as well as to the defendant but the defendant in this case would have a fee simple by adverse possession. In no case, therefore, could the "heirs of the body" take except by descent. In every case in which the devise could be given effect, the first taker would take a fee simple.

Further, as has already been emphasized in this brief, the words "heirs of the body" in a devise of this kind—a direct, express fee tail—are words of inheritance denoting the *quantum* of estate in the first taker. If, therefore, in the absence of controlling context, the court should hold that the estate would be a life estate and remainder, it could do so only by taking the liberty of changing words which the testator intended as words of inheritance to words of purchase. To hold that in a devise to "A and the heirs of his body," the word "heirs" was intended as a word

of purchase would be as absurd as to hold that in a devise to "A and his heirs" general, the word "heirs" was intended as a word of purchase. If "to A and the heirs of his body" means "to A for life remainder in fee simple to the heirs of his body," then "to A and his heirs" means to "A for life, remainder in fee simple to his heirs." This would be to change what was intended as a word of inheritance to a word of purchase; it would be to change what was intended as an estate of inheritance in the first taker to a life estate; it would be to create an entirely new and additional group of devisees, the heirs of the body, to take by direct devise when the testatrix did not intend to make a direct devise to them.

Further still, to hold that the devise would be a life estate and remainder, either would be illogical or else would amount to getting out of one difficulty only to get into another. For, if the devise were held to be a direct devise of a remainder to the heirs of the body, it would be a fee tail and not a fee simple in them, just as a direct devise to the heirs general of a person would be a fee simple in them. 2 Jarman, Wills, 5th Ed., 62. Hence, the court, in order to be logical, would have to repeat the process and hold that, since a fee tail could not exist in Hawaii, the devise to the heirs of the body would be a life estate in them and a remainder in the heirs of their bodies, and so on. In other words, the fee tail would have to be converted into a succession of life estates for as long a time as the rule against perpetuities would permit and then cease. And if it should be urged that the testator in-

tended that the heirs of the body should receive a benefit, it might be replied not only that that was no more the case than that he intended the heirs to receive a benefit in a devise to A and his heirs, but also that he intended just as much that the successive heirs of the body all the way down the line should receive a benefit, and if the first heirs of the body should be given a fee simple this would defeat the intention, if there was any such intention, as to all those further down the line.

Again, there is comparatively little difference between the different kinds of estates of inheritance. The important fact is that they are all estates of inheritance and therefore in a different class from life estates. A fee tail is merely a species of the genus fee. In a devise to "A and the heirs of his body," it is obvious that the testator intended to devise to A an estate of inheritance. Hence, if in a particular jurisdiction, as in Hawaii, only one kind of an estate of inheritance is allowed, namely, a fee simple (whether absolute or qualified), the devise must be held to be a fee simple, for there is no other estate of inheritance. It would have to be the only estate of inheritance there is.

Again, as suggested in *Rooke* v. *Queen's Hospital,* 12 Haw. 375, 393, since fees tail were the product of the statute *de donis,* in so far as they differed from fees simple conditional, the most natural course would be to hold that, if fees tail could not exist in Hawaii, the estate would be what it would be before that statute, namely, a fee simple conditional, which upon

performance of the condition, that is, the birth of issue, became a fee simple without the condition. And as we shall see presently the Oregon, Iowa and South Carolina courts took the view that if fees tail could not exist, the estates would be fees simple conditional, if the latter could exist. A fee simple conditional is even nearer than a fee tail to a fee simple. If fees simple conditional also, as well as fees tail, cannot exist, we have to pass on to a fee simple, as the next and only logical step, as the Oregon court held.

All the incidents of an estate tail lead the same way. This is especially true of the power to alien in fee simple. What more extensive dominion can there be over a piece of land or more indicative of the extensiveness of the estate than the power to convey it away in fee simple? The existence of estates of inheritance and the right or power to alienate them was a matter of gradual growth, until it came about that the words "heirs" or "heirs of the body" were used in a gift to "A and his heirs" or to "A and the heirs of his body" merely to donate an estate of inheritance in A and that the heirs or heirs of the body should inherit from A only in case A did not dispose of the property before he died. It is true that an attempt was made by the statute *de donis* to deprive a tenant in tail of the power of alienation and that the attempt was successful for a couple of centuries, until 1472, since when such estates could be aliened in fee simple by means of a common recovery even before birth of issue and so as to cut off the heirs of the body and the

reversion of the donor, and this power of alienation came to be an inseparable incident of an estate tail, and a common recovery came to be one of the recognized assurances or modes of conveyance of the realm. *Croxall* v. *Sherard,* 5 Wall. 268, 285; *Weld* v. *Williams,* 13 Metc. 486, 494; 1 Williams, R. P., 21st Ed. 253-4. It follows that, if a fee tail cannot exist, it should be converted into its nearest likeness, a fee simple, which carries the right to alienate in fee simple, rather than into something that has no resemblance to it, a life estate and remainder.

Plaintiff's counsel, however, seems to take the position that it is immateral for the purposes of this case that fees tail could be barred by common recovery for the reason that, as he says, they could not be barred by deed, and that common recoveries are not recognized in Hawaii. As to this, one of two things is certain: If a fee tail could exist in Hawaii, either the court would hold that its inseparable incident, a bar by common recovery, could exist there also, or else, if the court should hold that that remedy is too fictitious or out of date or inharmonious with Hawaiian judicial procedure to obtain there, it would hold that the alienation could be by deed. It is inconceivable that the court could take the backward step of holding that a fee tail could exist in Hawaii and at the same time that its inseparable and most salutary incident of alienability could not exist there. We presume that in Hawaii the court would choose the method by deed rather than that by common recovery, as that would be in line with the tendencies

of that court. And that would naturally follow from the reasoning upon which the courts of New Hampshire and Oregon, presently to be referred to more fully, which the Supreme Court of Hawaii adopted in the *Rooke* case (12 Haw. 375, 391-2), based their decision that fees tail could not exist in their respective jurisdictions. For, they held that the reason why that was so, was that such statutes as those of descents and wills made those estates practically fees simple inheritable and alienable like other fees simple. In most states in which fees tail are still recognized, they are by statute made alienable in fee simple by deed. But in some states at least, the courts have so held without the aid of statute. For instance, in *Ewing* v. *Nesbitt,* 88 Kan. 708 (129 Pac. 1131, 1134), the court, taking this view, said:

> "Fines and recoveries, however, are not adapted to any of our needs, are inconsistent with the Code of Civil Procedure and consequently cannot be resorted to. * * * The effect of these indirect, fictitious, and operose proceedings was merely that of a deed of record, and the same end may now be accomplshed by an ordinary conveyance. The fiction and the form alone are obsolete. The substance of the proceeding (a conveyance) and the essential character of the estate tail (the right to convert the estate into a fee simple by a conveyance) are preserved."

The other principal incidents of fees tail likewise bring them into close resemblance to fees simple as against life estates. For instance, they are without inpeachment of waste, and dower and curtesy may be had in them. 2 Bl., Com. 115-6.

All the presumptions that would strengthen the view that the estate should be held to be a fee tail, if such an estate could exist, equally support the view that it should be held to be a fee simple, if a fee tail could not exist. See Subdiv. 2 of Part II of this brief.

See also on the foregoing matters the decision of the Supreme Court in this case. 23 Haw. 747, 760; Tr., p. 57.

3. *The decisions are unanimous that what would be a fee tail at common law would be a fee simple (or a fee simple conditional where this is recognized) in the states in which fees tail do not exist and in which the question has been decided uncontrolled by statute.*

In most states fees tail are abolished by statute and usually the statutes declare also what the estates shall be. In some states there are neither statutes nor decisions on the subject. But in every state in which it has been held that fees tail do not exist and in which the question has arisen and has not been determined by statute, the courts have held that the estate would be a fee simple or a fee simple conditional, according as fees simple conditional could or could not exist. We challenge plaintiff's counsel to produce a single decision from a single state that either in its conclusion or in its reasoning points in the drection of a life estate and remainder.

The leading case is *Jewell* v. *Warner*, 35 N. H. 176. The devise was to A and B, "to be theirs, and the heirs of their body and their heirs' assigns." This would be an express fee tail at common law. There was no statute in New Hampshire either abolishing fees tail or declaring what they should be. The rule

in *Shelley's Case,* although it had been abolished, was in force at the date of the will, but had no application because the estate was an express fee tail, and that rule was not referred to in the case. The court held that neither fees tail nor fees simple conditional could exist in that state and especially on the ground that the statute of descents fixed the course of descent and that a testator could not impose restrictions on it or limit it to a narrower line than that fixed by the statute, and hence that any such restrictions would be inoperative and the estate would be a fee simple. We quote from page 185:

> "The distinction between estates tail and estates in fee smple, which it was the great object of the statute *de donis* to maintain, being thus abolished, all the restrictions imposed by that statute upon the right of alienation are swept away, as being inconsistent with the nature of fee simple estates. And in the same way the distinction which existed before the statute *de donis* between estates in fee simple and estates in fee simple conditional, is also abolished, and the grantor of real estate is deprived of all power to limit the course of descent. If property descends at all it must descend according to our law to the children and next of kin. Any attempt, therefore, to limit the descent of estates here to any other course of descent must be futile. *The restrictive words 'of the body' or 'male or female of the body' or 'by the body of any particular wife or husband,' added to 'heirs' are simply inoperative. They create neither an estate tail nor a fee simple conditional but an estate in fee simple, as if they had been entirely omitted."* (Italics ours.)

The court also (page 182) referred to the liability to be defeated by common recoveries and fines as "an

inseparable quality of an estate tail," and said (p. 188) that "by the descent to heirs generally they were become estates in fee simple, and as such liable to alienation by deed." The court also referred to the statute in regard to wills, which permits testators to devise their estates and which therefore are inconsistent with the nature of estates tail. The court further referred to the nature of such estates as not in keeping with present tendencies towards the alienability of estates.

It is of special significance that the Supreme Court of Hawaii in the *Rooke* case (12 Haw. 375 at 391, 392, 394) cited and approved this New Hampshire case and, indeed, based solely upon the authority and reasoning of that case its decision that neither fees tail nor fees simple conditional could exist in Hawaii.

In *Crockett* v. *Robinson,* 46 N. H. 454, the will was made before the rule in *Shelley's Case* was abolished, and the language was such that the estate could be a fee tail only by the operation of that rule. Yet even then the court, holding as it had to, that, if fees tail could exist there, the estate would be a fee tail under the law of that state as it was at the date of the will, held that, since fees tail could not exist there, the estate became a fee simple. Of course, if it had not been for the rule in *Shelley's Case,* it would have been a life estate and remainder.

In *Merrill* v. *Baptist Union,* 73 N. H. 414, the estate at common law would have been a fee tail cut down from a fee simple by implication by a gift over on extinction of lineal descendants, but the estate was held to be a fee simple, following the above mentioned two

earlier decisions. The rule in *Shelley's Case* had been abolished before the date of the will, and of course would not apply to such a fee tail by implication anyway, and was not referred to in the case.

In *Calder* v. *Davidson,* 59 S. W. (Tex.) 300, the deed was to A "and the heirs of her body" by her then husband. Estates tail had been abolished by the constitution but there was no statutory or constitutional determination of what they should be converted into. It being a plain case of an express estate tail, the rule in *Shelley's Case* had no application. The court, however, had more or less to say about the rule and seemed to be somewhat wabbly in regard to it. It said that the rule was law in that state, but that it did not apply to estates tail at common law and that in that state if the grantor clearly evinced on intention to create a life estate and remainder, that intention would control notwithstanding that rule, and that the rule was invoked usually only where there was an intention to give a life estate and remainder, and that no case had been cited in which the question of the rule had been raised on a deed "of such unequivocal import as the one under consideration." What it actually held was that the estate would be an estate tail special at common law, but that, since such estates were abolished in that state, it would be a fee simple. It said (p. 302):

> "The granting clauses are absolute and unrestricted, and there is nothing in the granting clause or the deed considered as a whole which may be fairly held to evince on intention to create a life estate with remainder over to any person.

> * * * There is nothing in the deed which can be held to restrict or modify the ordinary legal meaning and effect of the words 'heirs of her body by R. J. Calder.' At the common law the language would have created a fee tail special, and, since estates tail are forbidden in this state, the deed must be held to have vested a fee simple title in the first taker."

In *Rowland* v. *Warren,* 10 Or. 129, the devise was to "Mary E. Hembree * * * to her and her body heirs forever." As this was an express estate tail, the rule in *Shelley's Case* had no application to it even if it were law in that state, and was not mentioned. The court referred to the statute *de donis* as having converted fees simple conditional into fees tail mainly by taking away the power of alienation, and held, on reasoning similar to that in the earlier New Hampshire case, to which it referred, that the various statutes relating to descents, wills, conveyances, and sales on execution and by administrators, had not only displaced alienations by common recoveries but by implication had made all estates of inheritance subject to a general power of alienation and thereby impliedly repealed the statute *de donis* and consequently estates tail. It therefore held that, since an estate tail could not exist there, the estate would be what it would be before the statute *de donis,* namely, a fee simple conditional, if fees simple conditional could exist there, and that if such fees could not exist there, it would be a fee simple, but that in view of the facts of that case, it was unnecesssary to decide whether fees simple conditional could exist there or not.

In *Pierson* v. *Lane,* 60 Ia. 60, the deed was to A "and the heirs of her body begotten by said husband." This of course would be, as the court held, an express fee tail special at common law, but counsel in that, as in the present case, contending for a life estate and remainder, tried to ring in the idea of the rule in *Shelley's Case,* and contended that the estate could not be an estate of inheritance except by the operation of that rule and that the rule was not in force in that state. The court, however, said that that rule applied only where there was in terms a particular grant and a remainder and that it had no application to an express fee tail. It then held that as the object of the statute *de donis* was to place restraints on alienation, its purpose was foreign to the genius and policy of our institutions and hence that estates tail could not exist there. It did not say whether fees simple conditional could exist there, but seemed to assume that they could and that the estate became such a fee, and held that since the devisee had heirs of the kind specified, her fee became absolute and her deed carried the entire estate.

In *Archer* v. *Ellison,* 28 S. C. 238 (5 S. E. 713), the deed was to A "and the natural heirs of her body." This also was the case of an express fee tail, to which the rule in *Shelley's Case,* if it were law there, would have no application. The court, however, without mentioning the rule, called attention to the marked difference between such a case and one where there was in terms a particular estate and a remainder. It seems that the statute *de donis* never obtained in South Carolina, but that fees simple conditional were recognized

there, and it was held that the estate was such a fee and that is could be conveyed by a married woman under an act permitting her to make conveyances of her estates of inheritance and said that there was "but little difference between an estate in fee simple and an estate in fee conditional." There can be no doubt that in this and the Iowa case the courts would have held the estates to be fees simple if fees simple conditional could not exist there.

In Connecticut a unique view is taken. As a result of a peculiar rule against perpetuities, at first adopted by the courts as a part of the common law of that state and afterwards embodied in a statute, it was held that an estate tail could not continue beyond the immediate issue of the first taker. Hence, although they held that estates tail and fees simple conditional strictly speaking could not exist in that state, they held that an estate which would be a fee tail at common law would in that state be substantially a fee tail as long as it could be, that is, until it got to the first issue, and that when it got there it would become a fee simple since it could no longer exist as a fee tail. *Hamilton* v. *Hempstead,* 3 Day 332, 339; *Whiting* v. *Whiting,* 4 Conn. 179, 181; *Goodman* v. *Russ,* 14 Conn. 210, 216; *St. John* v. *Dann,* 66 Conn. 401, 408.

4. *Similar unanimous decisions relating to personal property are strictly analogous and lead to the same conclusion.*

Estates in personal property may, of course, be either absolute, corresponding to an absolute or fee

simple estate in real property, or for life and remainder. That is so in Hawaii as well as in other jurisdictions. *Damon* v. *Dickson,* 7 Haw. 694, 695. But they cannot be in tail. Hence, when words are used with reference to personal property, which if used with reference to real property would create an estate tail, the situation in the case of personal property at common law or everywhere is precisely the same as it is in the case of real property in a particular jurisdiction in which estates tail are not recognized. But it is everywhere held, both in England and America, that, since an estate tail cannot exist in personal property, words which would create such an estate in such property, if it could exist, create an absolute estate and not a life estate and remainder.

The rule is stated thus by Jarman (2 Wills, 5th Ed., 562):

> "It has been established by a long series of cases, that where personal estate * * * is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail * * * *that being the only mode in which personalty can be dealt with in order to make the interest in it analogous to an estate tail.*" (Italics ours.)

Of course, if the bequest would be an express estate tail, if such an estate could be created in personal property, the case would be clear.

But even if the language used would apparently creat an estate tail only by operation of the rule in *Shelley's Case,* the estate would likewise become abso-

lute, because an estate tail on personal property can not exist. Such a case was *Elton* v. *Eason,* 19 Ves. Jr. 73, 78, in which the court said:

> "It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in land, gives the whole interest in personal property; which is incapable of being entailed."

Of course, in a jurisdiction in which, as in Hawaii, the rule in *Shelley's Case* does not obtain, such a bequest would be a life estate and remainder.

So, also, if the bequest would be a fee tail only by implication; as, to A and his heirs, with a gift over upon on indefinite default of issue, thus cutting down to a fee tail what would otherwise be a fee simple, the devise would be absolute in the first taker, if a fee tail could not exist. Such a case was *Hall* v. *Priest,* 6 Gray, 18, 21, 22, in which both real and personal property were involved, and it was held that since fees tail could exist in real property and could not in personal property in that state, the devise would be a fee tail in respect of the real property and absolute in respect of the personal property.

Of course, also, if the gift over upon default of issue were upon a definite default, whether so expressly or because words which at common law would be construed as importing an indefinite default are held or declared by statute in the particular jurisdiction to import a definite default, the result would be different.

In each instance, in the case of personal property as well as in the case of real property, the courts first find whether the estate would be an estate tail, if such an estate could exist, and then, if they find it would be, they hold that it is absolute in the first taker, in case an estate tail cannot exist. They do not reverse the process of reasoning and hold that because estates tail cannot exist the words in question must be construed to be words of purchase and not of limitation. Nor do they hold that, since estates tail cannot exist, they, the courts, can make a new devise or bequest according to what they think the testator might have done if he had known that estates tail could not exist.

In *Smith's Appeal,* 23 Pa. St. 9, the devise was of both real and personal property in such a way as to create a fee tail, if a fee tail could exist, by implication by reason of a gift over upon death without issue (indefinite default) after what would otherwise be an absolute estate, although the word "heirs" was not used. The court held that the estate was an estate tail in the real property and an absolute estate in the personal property. It said in regard to the latter (pp. 10, 11):

> "Now as to the personal property. Let it be noticed that the legacy is in terms absolute, and that it is qualified only by the bequest over on his death without issue. But these are words of entailment and therefore, when applied to personal estate, they pass the absolute property. * * * A different construction is usually put upon the phrase 'dying without *leaving* issue,' when applied to personal property. * * *
>
> "It is a general, not to say universal rule, that words which, when applied to land, would create

> an estate tail, will, when applied to chattels, pass the entire interest. How can it be otherwise? * * * A devise of land to a man and his issue is therefore good; but of chattels it is, *prima facie,* bad as to issue; for that word unexplained, must be taken in its technical sense, as a word of limitation, and not of purchase.
>
> "There is nothing in this devise to take it out of the general rule. Not one word indicates an intention to limit the interest of the first takers to life."

The court then, as if to emphasize or expand its question "how can it be otherwise?" proceeded to give a number of reasons, in the quotation from that case in Subdivision 2 of Part II of this brief, to show that the estate could not be held to be a life estate and remainder.

The analogy between personal property as respects estates tail at common law and real property as respects such estates in a jurisdiction in which such estates cannot exist in real property, was recognized by the Supreme Court of Hawaii in the case in which it was held that such estates in real property cannot exist in Hawaii (*Rooke* v. *Queen's Hospital,* 12 Haw. 375, 400), and also in the present case, 23 Haw. 747, 760; Tr., p. 56.

5. *Analogous decisions at common law relating to real property necessitate the same conclusion.*

At common law lawful restraints or limitations on the course of descent were confined to heirs of the body. They might be the heirs of the body, or heirs of the body by a particular wife, or heirs male or heirs

female of the body, or heirs male or female of the body by a particular wife, etc. Thus there might be fees tail general or special or more special still. But similar restrictions or limitations of the heirs general were not allowed. For instance, an estate could not be limited to A and his heirs male or to A and his heirs female, so as to make the descent to the heirs male (or female), whether descendant, ascendant or collateral. They could be limited to the heirs male (or female) only when also limited to the heirs descendant, thereby making an estate tail. What, then, would be the effect if an attempt should be made to limit the descent to a certain class of the heir general? There can be only one answer. The words expressive of such an unlawful restraint would be futile or inoperative and the descent would be to the heirs general, creating a fee simple general instead of a fee simple special, if such an expression may be used. And yet, on the plaintiff's reasoning, the court should hold in such case that the devise would be to the first taker for life with remainder in fee simple to his heirs male!

Now, a fee simple conditional or a fee tail is a fee with the course of descent limited to a certain class of the heirs general, namely, to the heirs of the body or to some particular class of the heirs of the body. If that is allowable, well and good; a fee simple conditional or a fee tail results. If that is not allowable any more than a limitation to some other particular class of the heirs general, the limitation is merely inoperative and the fee is a fee simple. It would be

the same if a limitation were allowable only to the heirs of the body and not to the heirs male of the body. In such case the word "male" would be inoperative and the estate would be a fee tail general.

Or, to look at it in a slightly different way, a freehold estate is either an estate for life or an estate of inheritance. The word "heirs" indicates that it is an estate of inheritance. Any additional words purporting to restrict the heirs to a particular class are effective if recognized by the law and ineffective if not recognized. Holding that the additional words cannot be given effect, does not change the estate from an obviously intentional estate of inheritance in one person to an arbitrary life estate in that one and an estate of inheritance in another to whom no direct devise was intended.

Thus, the case of a devise to A and the heirs (or heirs male) of his body in a jurisdiction in which a restraint of the heirs general to the heirs of the body, that is, in which a fee tail, is not recognized, is exactly like the case of a devise to A and his heirs male at common law where such a restraint from the heirs general to the heirs male is not recognized. Hence, the effect in both cases must be the same. The unlawful restraint is inoperative and the estate, being an estate of inheritance, is a fee simple, which is the only estate of inhertance recognized in Hawaii.

Littleton says (Co., Litt., Sec. 31):

> "But if a man give lands or tenements to another to have and to hold to him and to his heirs males, and to his heirs females, he, to whom such a gift is made, hath a fee simple."

And Coke says (Co., Litt., Sec. 31, p. 27 b):

> "Littleton's reason being shortly this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee tail; but where lands be given to a man and his heirs males, he hath no estate tail and therefore he hath a fee simple."

See also 2 Bl. Com. 115.

Indeed, there is little difference between the various fees. They are simply different species of the same genus. As Littleton says, "all inheritances were fees simple" before the statute *de donis* (Coke, Litt., Sec. 13), referring to which Coke comments, in the same section, "Here fee simple is taken in his large sense, including as well conditional or qualified, as absolute, to distinguish them from estates in tail since the said statute." And the difference between qualified (base or determinable) fees and conditional fees (fees simply conditional and fees tail) is really that the former are fees simple conditioned as to duration and the latter fees simple conditioned as to the course of descent. And even fees tail were not so much created as preserved by the statute, fees simple conditional also having previously been called fees tail.

In *Idle* v. *Coke,* 2 Salk. 620 (91 Eng. Rep. 525), the court said:

> "A gift to H and his heirs males, or a gift to H and his heirs females, is not an estate tail; because it is not, nor does it appear of whose body they are to issue. At common law this would not be a fee conditional; and the statute *de donis* does not create estates tail, but preserves them; a fee at common law was either absolute or restrained;

> those restrained fees were either restrained as to duration, as a gift to A and his heirs, while such a house stood, etc., which was a base fee; or restrained as to what particular heirs, or of whose body issuing should inherit, which was a fee conditional, and is by the statute turned into an estate tail; *ergo* this is a fee simple at common law, and is so at this day; for these are words to create an inheritance, but none to restrain that to issue or heirs of the body of the party."

In *Doe* v. *Martyn,* 8 B. & C. 497, 511 (108 Eng. Rep. 1127, 1132), the limitation was by way of remainder to "the use of the right heirs male of Thomas Martyn." The court said:

> "The first question in this case is, what is the effect of the limitation to the use of the right heirs male of Thomas Martyn? Whether those words are words of limitation or words of purchase? It is conceded, and rightly, by Mr. Fraser, that they were to be taken as words of limitation, unless a contrary intention were manifest. * * * I cannot see any such contrary intention. Were I at liberty to conjecture, the opinion I should form would be, * * * that he unintentionally omitted the words to show of whose body they were to be the heirs male. The consequence of this would be, that these would be words of limitation, that the word 'male' must be rejected, and that under these words Thomas took immediately the ultimate remainder in fee.' "

6. *Hawaiian statutory and case law both require the same conclusion.*

(a) By Section 1 of the Revised Laws, enacted in 1892, "The common law of England, as ascertained by English and American decisions, is declared to be

the common law of the Territory of Hawaii in all cases," except certain specified classes of cases. Within the meaning of this statute, the common law consists of principles or a system of legal logic rather than a code of set rules, and is to be ascertained by American as well as English decisions. *Macauley* v. *Schurman,* 22 Haw. 140, 144, and cases there cited. And, as we have seen, by unanimity of such decisions, both American and English, whether directly in point or by analogy on principle or logic, an estate which would be a fee tail, if a fee tail could exist, would be a fee simple, if a fee tail could not exist.

(b) In the *Nahaolelua* case (20 Haw. 372), the court held not only that the estate would be either a fee simple or a life estate and remainder according to which appears to most nearly carry out the intention, but also that this is "governed by the established rules of construction," and we have seen that the established rules of construction require that what would be a fee tail, if a fee tail could exist, shall be held to be a fee simple, in the absence of controlling context.

(c) In the *Rooke* case (12 Haw. 375, 391-2), the main basis of the decision that fees tail could not exist in Hawaii was that under the Hawaiian statute they must descend to the heirs general and hence must be fees simple. The court relied on the New Hampshire case, in which it was held, as already shown (35 N. H. 176, 188) that "by the descent to heirs generally (under the statute of descent) they (fees tail) were become estates in fee simple, and as such alienable by deed."

7. Statutes on the subject favor a fee simple in the first taker.

While statutory declarations as to fees tail and their incidents are in a sense arbitrary or artificial, it is instructive to note their trend, and the Supreme Court of Hawaii has often referred to the state of modern thought on a given subject as embodied in statutes as worthy of consideration in determining questions presented to it in cases where the common law is not suited to present conditions. See *Branca* v. *Makuakane,* 13 Haw. 499, 505.

Many of the text books purport to classify the state statutes on the subject of estates tail, but all are inaccurate and incomplete. One of the better and more recent statements may be found in 2 Underhill, Wills, Sec. 654.

An original examination of the statutes and decisions of all of the states, so far as available in Hawaii, discloses, in general and subject to variations in details, that of the forty-eight states, thirty have statutes or decisions that either make the estate a fee simple in the first taker or else give him the full power of alienation in fee simple by deed, two have statutes that appear to give the first taker an estate of inheritance, subject to dower, etc., but without the power of barring the heirs by conveyance, seven have statutes which make the estate a life estate in the first taker and a fee simple in the second taker, and nine have neither statutes nor decisions on the subject. In the majority of the first group the estate is made a fee simple outright. In all except one in each of the sec-

ond and third groups the rule in *Shelley's Case* obtains, and in several of these it is not the heirs of the body according to the state statute of descent who are to have the remainder, but those who would be the heirs at common law—the eldest son and not all the children.

While an arbitrary rule that in all cases the estate shall be a fee simple in the first taker defeats the probable actual intention in cases in which the estate would be a fee tail only by the rule in *Shelley's Case,* and an arbitrary rule that in all cases the estate shall be a life estate and remainder defeats the intention in cases in which the estate would be a direct, express fee tail, it appears that in more than three-fourths of the states the preference is for a fee simple and that this is so in all cases in which the question has been determined by decision, and that in all except one of the states in which the statutory preference is for a life estate and remainder the rule in *Shelley's Case* obtains, which doubtless accounts in large part for the statutes in those states.

V.

APPLYING THE FOREGOING PRINCIPLES TO THE FACTS OF THIS CASE, THE ESTATE IN QUESTION MUST BE HELD TO BE A FEE SIMPLE.

1. *The will and codicils overwhelmingly necessitate this conclusion.*

As already shown, this is the case of a direct, express, intentional fee tail in the first takers. If there

were nothing else in the will and codicils bearing on the question, the estate would necessarily, as also already shown and as held by the Supreme Court of Hawaii in this case, have to be held a fee simple in the first takers, since fees tail cannot exist in Hawaii. But there is much else in the will and codicils bearing on this question, and everything emphasizes the inevitability of the same result. So much so, indeed, that even if what is in terms, a direct, express, intentional fee tail would, standing alone, be presumptively a life estate and remainder in a jurisdiction in which a fee tail cannot exist, that presumption would in this case be clearly overcome. This appears both from the devise in question and from other parts of the will and codicil taken as a whole. The will and codicils are drawn with the greatest nicety. They show with unusual clearness and force and in many ways, directly, expressly, by implication and by contrast, both that the devise was intended to be made to the first takers alone and that it was intended to be an estate of inheritance in them. There is not a word in the will or either codicil upon which to base a theory of only a life estate in the first takers or a theory of a present direct devise—an estate by purchase—in the heirs of the body, or a theory of any special benefit to such heirs, any more than would be the case if the devise had been to "K and K and their heirs." It is unnecessary to repeat here an analysis of the will and codicils. That has been done under Subdivision 4 of Part II of this brief, and we respectfully ask the court to consider that subdivision of this brief as if repeated here.

2. *The Nahaolelua and Boeynaems Cases not only do not militate against but support this conclusion.*

If the court should be of the opinion that the *Nahaolelua* case (and the *Boeynaems* case, which merely followed it) cannot be distinguished from the present case, we submit that it should be overruled. The reasons are so convincing why the estate now in question should be held to be a fee simple, that the decision in that case should not be allowed to stand in the way of doing justice in this case, or in other cases that may arise in the future on wills or deeds of long ago, in reliance upon which vast expenditures have been made in improvements.

That decision is so recent that it cannot be considered as having become a rule of property. The question on the deed there involved has been in practically continuous litigation since it first arose until almost the present time. The decision cannot have been acted upon, not only because of such litigation, but also because of the uniqueness of its facts and the probability that no attempts have been made since then or, indeed, since the *Rooke* decision, or will hereafter be made, to create estates tail, and because, if, as the plaintiff contends, the *Nahaolelua* case is in its facts in point in the present case, then the ground upon which it was decided is set forth so obscurely that no one could act upon it with certainty without further clarification by the court.

The decision of the Federal Supreme Court, of course, would in no wise prevent the Supreme Court of Hawaii from overruling these former decisions of

its own, inasmuch as the Federal Supreme Court did not decide the case on its merits but in effect left the question exclusively to the local court. The court would have affirmed the decision in that case just as readily if the decision had been the other way. And, of course, the facts in the present case are so different from those in that case that that court would not think of saying that they were not materially different. That court even went so far in *Kapiolani Estate* v. *Atcherly,* 238 U. S. 119, as to hold that, when a material new fact appeared, the Supreme Court of Hawaii should have held differently from a decision rendered by the Federal Supreme Court on an earlier appeal in the same case.

Moreover, when under the circumstances the same local court which decided the *Nahaolelua* and *Boeynaems* cases could find nothing in those cases to prevent it from deciding the present case the way it did, we submit that this court, if it is of the opinion that the present case was correctly decided, should not take the position that it must decide it incorrectly because of anything in those earlier decisions, even if it should find that those decisions in fact if not in theory were inconsistent with the decision in this case.

Assuming, however, that the *Nahaolelua* case was correctly decided, it is easily distinguishable from this case. The two cases, indeed, are so wide apart in their facts with reference to the theory upon which the *Nahaolelua* case was decided, that there is little real resemblance between them, and that case can on that theory be allowed to rest on its own special facts

so far as this case is concerned. And that is the view taken by the Supreme Court of Hawaii in this case. (23 Haw. 747, 757-9; Tr., pp. 53-55.)

It goes without saying that the doctrine of *stare decisis* does not apply except when the very point in issue was in issue in the earlier case and was actually required by the facts to be decided. See especially *Mossman* v. *Government,* 10 Haw. 421, 429-433; *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 574-5. And nothing could be more dangerous or unscientific than to hold that one case is governed by another merely because of a superficial similarity. The entire system of the common law has been built up on distinctions between the facts of different cases. The very essence and merit of the system is that each case is to be decided on its own facts.

Now, what were the facts in that case? There were two deeds. The first was expressly referred to in the second as one of the matters leading up to the second. For the purposes of construction it was made a part of the second. The court took that view. It set forth at length in the decision all of the material parts of both deeds. It appears that, as set forth by the court, the grantor in the first deed, being then unmarried but about to get married, and in contemplation of marriage and of the possible birth of issue, conveyed the land (a half interest) to two trustees in trust for the grantor herself until the solemnization of the marriage, and after such solemnization to pay the net rents and profits to her free from control during her said intended coverture, and upon further

trust in case of her decease after such solemnization and during the lifetime of said intended husband leaving issue of said intended marriage, to pay and apply the said rents and profits to the support, education and advancement of such issue, and, if only one child, then for such child, during minority, and upon further trust, upon such child or children attaining majority, to convey the land to such child or children in fee simple. What could be more indicative of a general intention to create an interest for life in the first taker and, at least in certain contingencies, a fee simple in the second takers, who, also, were to be the immediate children and not the issue of every degree? What could be more indicative of a special intention to benefit the children directly in certain contingencies by giving them the fee simple after the death of the life tenant or at a little earlier or later date, and, even more than that, to give the children from the time of their respective births the benefit of the property even before the death of the life tenant, The primary and expressed intention was the direct benefit of the children.

The marriage took place. A son was born. The grantor's hopes had been realized to that extent. As an actual mother she wished now to do even more for the children. Hence, the second deed. It recited that the first, the "ante-nuptial deed of trust," had been made, describing it; that since then the marriage had taken place and a son, naming him, had been born, who was then living; and that the mother had also since then acquired the other half interest in the

property by descent from her brother. The deed then proceeds, that therefore and in consideration of the premises, the marriage and the birth of the son then living, and at the request of the mother, the trustees conveyed the entire land to her, and to the heirs of her body, to have and to hold to her, and the heirs of her body forever, in special trust for the use and benefit of her said son, naming him, and such other child or children as may thereafter be born to her, and his or their heirs and assigns forever, as he or they shall arrive at majority. Here, again, as in the first deed, if anything is clear, it is an intention to benefit the immediate children directly by giving them a fee simple interest from the time of their majority, the intention being in a general way apparently to give the use and benefit to the mother until the children came of age and then to the children. Both deeds were somewhat inartificially drawn and failed to provide for all contingencies and the court doubtless felt that it had to make the best of them that it could. All parts of both deeds manifest in the strongest way a general and special intention to benefit the children directly by giving them a fee simple interest in remainder after a life or near-life interest in the mother as first taker. It is true that the court held that one clause, the trust clause, in the second deed was not valid, but that, of course, would not detract from its value or effect as showing the intention. (*Heaseman* v. *Pease,* L. R., 7 Ch. App. Cas. 275, 283.) And that is the view taken by the Supreme Court of Hawaii in the present case. (23 Haw. 747, 758; Tr., p. 54.)

It also is the view taken by counsel for the plaintiff in the present case, who, in his printed brief in the Federal Supreme Court in the *Boeynaems* case, said:

> "But this recital follows a recital of her marriage and the birth of a child, a much more important factor in determining intention, since the deed not only recites this fact as one of the reasons, but recites the marriage and the 'birth of a son now living' as the *consideration for the deed,* and further recites in the habendum clause that the deed is executed *'in special trust for the use and benefit of her said son Edward Nahonoomaui Kia and such other child or children as may hereafter be born to her.'*
>
> * * * * * * * *
>
> "These reasons strongly support the construction placed upon the deed by the Hawaiian Court. The children did have an interest under the original deed. The construction claimed by the plaintiff in error would entirely take away any interest which they might have under the later deed to Elizabeth. Moreover, the invalid trust clause and the heading 'Trust Deed' show that the parties did not intend to make an absolute deed in fee simple to Elizabeth, but that it was understood that the children born and unborn, had a present interest in the estate conveyed."

In the *Nahaolelua* case all the provisions of both deeds, outside of the immediate granting and habendum parts, pointed strongly in one direction, that of a life estate and remainder. In the present case, all the provisions of the will and codicils point as strongly in the other direction, that of a fee simple.

Counsel for the plaintiff evidently finds much embarrassment in the position he took in the *Boeynaems* case. Apparently he has concluded that the least

awkward thing to do now is to put on a bold front and take a directly contrary position. Evidently also he is equally embarrassed by the reasoning of the court in the *Nahaolelua* and *Boeynaems* cases. In order to avoid the effect of that reasoning and at the same time to make the decisions in those cases available for the support of his contentions in the present case as against all decisions elsewhere, he would have this court rewrite those decisions to suit his purposes. He now contends that, although the local court, as he then contended it should do, decided those cases on the theory that the estate would be either a fee simple or a life estate and remainder according to which would more nearly approximate the intention, this court should hold that that court erred in adopting that theory and should hold further, not that therefore that court should have come to the opposite conclusion, but that this court should accept the conclusion of that court, although erroneous, as establishing the law in Hawaii, and then hold that that court, in order to come to that conclusion logically, must have held, contrary to its express declaration, that the estate would be a life estate and remainder in every case, and hence that the decision in this case, although correct on principle and authority, should be reversed! In other words, that since, as he contends, the local court reached an erroneous conclusion from erroneous premises, this court, instead of substituting a correct conclusion from correct premises, should allow the incorrect conclusion to stand but substitute other and even more patently incorrect premises in order to sup-

port the incorrect conclusion in a way that will help the plaintiff in the present case.

The decision in this case is clearly correct. If the decisions in those cases are incorrect, they should be overruled. If they are correct, or if, in case they are incorrect, they should be allowed to stand, they are, as the same court which decided them has held in this case, easily distinguishable from this case on the facts so far as the conclusion is concerned, while the reasoning on which the conclusion was based in those cases absolutely necessitates the conclusion reached by the local court in this case. Thus, those cases support the defendant in this case.

VI.

EVEN IF THE NAMED DEVISEES TOOK ONLY A LIFE ESTATE AND THE HEIRS OF THE BODIES A REMAINDER IN FEE SIMPLE, STILL THE DEFENDANT WOULD BE ENTITLED TO POSSESSION AND THE PLAINTIFF COULD NOT RECOVER AT THIS TIME.

By item 16 of the first codicil (Tr., p. 88), the testatrix empowered all beneficiaries to whom she gave life interests in any lands to make valid leases of them for terms of ten years, the rentals under such leases after the deaths of the life beneficiaries to go to the trustees under the will. The named beneficiaries of the land of Hanohano now in question gave a lease of the whole of that land to Mr. Robinson for a term of fifty years beginning January 1, 1892. (Tr., p.

76.) Consequently, we submit, he and his assignee of a part of the land, the defendant, could in any event hold for a period of ten years after the death, on June 8, 1914, of the survivor of the named beneficiaries even if they were only life tenants.

It is true, the lease was for fifty years and not for ten years. But that, we submit, is immaterial. If the named devisees took life estates, the testatrix could not, if she would, have limited their right to make leases to ten years. That would be an unlawful restraint inconsistent with the devise. They could in any event make leases that would be valid for at least the life estate. The intent was not to limit powers, but to confer additional powers by enabling them to make leases that would be good for a reasonable period after the termination of the life estates. For instance, could not the life tenants make a lease for ten years to begin five or ten or twenty years thereafter, and would it not be valid in case that time of beginning should fall within the life estate? Or, could not they make a lease for ten years to begin the day before the survivor of them died? Or, could they not make several leases of ten years each to take effect successively? Why, then, not make one long lease to be good for the life estate and not exceeding ten years thereafter. If they made a ten-year lease, there would be nothing to prevent its cancellation by mutual agreement before its expiration, if the life tenants seemed to be nearing their ends, and the making of a new similar ten-year lease then. The lease in question, of course, was made in the best of faith and at a great increase in

rental, doubtless due largely to the length of the lease, which would warrant large expenditures in development.

It may be argued *contra,* however, that when Mr. Robinson bought from Mr. Bishop, as he supposed, the fee simple, or on the plaintiff's hypothesis, the life estate, the lease became merged in the estate thus conveyed. True, a lesser estate usually merges in a greater estate, but equity prevents this so as to carry out the intention, or, when no intention is expressed, so as to protect the interests of the person in whom the estates are united. (16 Cyc. 666.) For instance, if the greater estate were set aside, there would not be a merger so as to destroy the lesser estate also. (16 Cyc. 667.) If, as we contend, Mr. Robinson got the fee simple, of course there would be a merger. But, if he got only a life estate, he should not on that account be deprived of his lease. We submit that in Hawaii, where equitable defenses are so freely admitted at law (*Kamohai* v. *Kahale,* 3 Haw. 530, 532), the rule as to merger would be the same at law as in equity. For instance, equity will, in order to protect the person in whom the estates meet, prevent a merger of an estate for years in a life estate. (16 Cyc. 668.) Likewise, although an estate *pur autre vie* ordinarily would merge in an estate for one's own life, equity will prevent it in order to do justice. (*Id.*) So in Hawaii, at law, where there was an estate to A for life, remainder to B for life, remainder to C in fee, and A sold to B and then outlived B, it was held that A's estate did not merge in B's. (*Atcherly* v. *Lewers*

& Cooke, 18 Haw. 625, 627. See, also, on this subject, *Evans* v. *Bishop Tr. Co.,* 21 Haw. 74, 82-3; *Godfrey* v. *Rowland,* 16 Haw. 377, 389.)

We submit, therefore, in conclusion that the judgment of the Supreme Court of Hawaii should be affirmed.

Dated at Honolulu, this 20th day of February, A. D. 1918.

Respectfully submitted,

FREAR, PROSSER, ANDERSON & MARX,
THOMPSON & CATHCART,
FREDERICK W. MILVERTON,
Attorneys for Defendant.

SYNOPSIS OF WILL AND CODICILS OF BERNICE P. BISHOP.

(The parts particularly involved in this case are in italics.)

THE WILL.

(Oct. 31, 1883.)

Items.

1. $200 each to seven young women namesakes: E. Bernice Bishop Dunham, Bernice Parke, Bernice Bishop Barnard, Bernice Bates, Anne Pauahi Cleghorn, Lilah Bernice Wodehouse and Pauahi Judd.
2. $200 each to four special women friends: Mrs. William F. Allen, Mrs. Amoe Haalalea, Mrs. Antone Rosa and Mrs. Nancy Ellis.

Items.

3. $500 each to four apparently needy women friends: Mrs. Caroline Bush, Mrs. Sarah Parmenter, Mrs. Keomailani Taylor, free from the control of their husbands, and Mrs. Emma Barnard.
4. Two lands to H. R. H. Liliuokalani, wife of Gov. John O. Dominis, "to have and to hold for and during the term of her natural life, and after her decease to my trustees upon the trusts below expressed."
5. *"I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars ($30.) per month, (not $30. each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed."*
6. $40 to Mrs. Kapoli Kamakau "per month during her life" and $30 each to servant woman Kaia and to Nakaahiki (w) similarly for life.
7. A house lot to Kapaa (k), "to have and to hold for and during the term of his natural life; upon his decease to my trustees."
8. A house lot to Aukea (w), wife of Lokana (k), "to have and to hold for and during the term of her natural life; upon her decease to my trustees."

Items.

9. Numerous lands, including Molokai ranch and the live stock and personal property thereon, to her husband, Charles R. Bishop; "to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees."
10. Certain premises to her Majesty Emma Kaleleonalani, Queen Dowager; "to have and to hold with the appurtenances for and during the term of her natural life; and upon her decease to my trustees."
11. $5000 for repairs or improvements upon Kawaiahao Church.
12. $5000 for additions to Kawaiahao Family School for Girls.
13. "All of the rest, residue and remainder of my estate, real and personal, wherever situated, unto the trustees below named, their heirs and assigns forever" in trust for the Kamehameha Schools.
14. Appoints trustees.
15. A fish pond also (in addition to devise in item 10) to said Emma Kaleleonalani, Queen Dowager, "for and during the term of her natural life; and after her decease to my trustees."
16. "All of my personal property of every description, including cattle at Molokai" (in addition to devise in item 9) to her husband, Charles

Items.

R. Bishop; "to have and to hold to him, his executors, administrators and assigns forever."

17. Appoints executors.

FIRST CODICIL.
(Oct. 4, 1884.)

1. $1000 to Mrs. W. F. Allen (in lieu of the $200 given by item 2 of the will).
2. Other premises to Queen Emma (in lieu of those given by item 10 of the will); "to have and to hold for and during the term of her natural life; and upon her decease to my trustees."
3. Various additional lands to her husband, Charles R. Bishop; "to hold for his life, remainder to my trustees."
4. Piece of land to Kuaiwa (k) and Kaakaole (w), "old retainers of my parents"; "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees."
5. Certain premises to Kaluna (k) and Hoopii, his wife; "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees."
6. An acre lot to Naiapaakai (k) and Loika Kahua, his wife, "to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees."
7. $300 per year during minority, then $1000 lump,

Items.

to Lola Kahailiopua Bush, free from the control of her husband.

8. Same to Bernice B. Barnard (in lieu of $200 under item 1 of Will) free from the control of her husband.

9. Land (Moanalua) and fishery to "my friend" Samuel M. Damon; "to have and to hold with the appurtenances to him, his heirs and assigns forever."

10. $20 per month each to "my servants" Kaleleku (k) and Kaoliko, his brother, "during the term of the natural life of each of them."

11. *"I revoke so much of the fifth article of my said will as devises the land known as "Mauna Kamala" to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."*

12. $2000 each to Iolani College, St. Alban's Priory and St. Andrews Church.

13. Land and spring to Kaiulani Cleghorn, daughter of A. S. Cleghorn, "to have and to hold for and during the term of her natural life; remainder to my trustees."

14. $500 to Rev. Henry H. Parker.

Items.

15. $200 to Mary B. Collins, $100 to Maggie Wynn, in each case "if she be with me at the time of my death."

16. *"I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent however, after such decease to be paid to my executors, or trustees; provided, however, that no rent be collected for a longer period in advance at any one time than for six months, and no bonus be taken by said devisees or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors or trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in advance than for six months or who shall have taken such bonus."*

17. Powers of trustees.

SECOND CODICIL.

(Oct. 9, 1884.)

1. Land and fishery (in addition to devise in item 4 of will) to H. R. H. Liliuokalani, wife of

Items.

John O. Dominis; "to have and to hold for and during the term of her natural life, remainder to my trustees."

2. Land (in addition to house lot under item 7 of will) to Kapaa (k), he to pay taxes thereon and upon the lot devised to Aukea; "to have and to hold for and during the term of the natural life of him said Kapaa, remainder to my trustees."

3. A house lot to Aukea (w), wife of Lokana (in lieu of house lot devised by item 8 of will); "to have and to hold for and during the term of the natural life of her, said Aukea, free from the control of her husband; remainder to my trustees."

4. Directions in regard to Kamehameha Schools.

SUMMARY OF WILL AND CODICILS.

		Will. Items.	*1st Cod.* Items.	*2d Cod.* Items.
1.	Lump sum to 18 persons.....	1, 2, 3	14, 15	
	One lump sum substituted for another		1	
2.	Lump sums to 5 schools and churches	11, 12	12	
3.	Annuities during minority, then lump sums, to 2 persons..... (One of these in substitution for lump sum under 1 above.)		7, 8	
4.	Annuities to 3 persons for life..	6		
5.	Annuity to each of two brothers for life of each.....		10	
6.	Annuity to both and survivor so long as either lives (husband and wife)	5		

Items.

7.	Personal property to one and executors, administrators and assigns	16		
8.	Land to 7 persons for life, remainder to trustees ...4, 7, 8, 9, 10, 15			
	Other lands substituted in 2 cases		2	3
	Other lands added in 3 cases....		3	1, 2
9.	Lands to 3 sets of 2 persons each for lives and that of survivor; remainder over ..... (In 2 cases expressed to be husband and wife.)		4, 5, 6	
10.	*Land to 2 persons and heirs of body of either (husband and wife)*	5		
	Other land is substituted to same 2 persons, to hold as above limited		11	
11.	Lands to one person, his heirs and assigns		9	
12.	Land and personalty (residue) to trustees, their heirs and assigns	13		
13.	Directions to trustees			4
14.	Powers of life tenants to lease for 10 years		16	
15.	Appoints trustees	14		
16.	Appoints executors	17		